CORRECTED COPY



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-5844

STANISLAUS ROBERTS,

*Petitioner,*

v.

STATE OF LOUISIANA,

*Respondent.*

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF LOUISIANA

## BRIEF FOR PETITIONER

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## BRIEF FOR PETITIONER

---

## OPINION BELOW

The opinion of the Supreme Court of Louisiana affirming petitioner's conviction of first degree murder and sentence of death by electrocution is reported at 319 So.2d 317 (1975). The judgment of the Fourteenth Judicial District Court, Parish of Calcasieu finding petitioner guilty and sentencing him to die is unreported.

## JURISDICTION

The jurisdiction of this Court rests upon 28 U.S.C. §1257 (3) (1970), the petitioner having asserted below and asserting here a deprivation of rights secured by the Constitution of the United States.

The judgment of the Supreme Court of Louisiana was entered on September 5, 1975. Timely application for rehearing was denied on October 9, 1975. The petition for certiorari was filed on December 4, 1975, and was granted on January 22, 1976.

## QUESTION PRESENTED

Whether the imposition and carrying out of the sentence of death for the crime of first degree murder under the law of Louisiana violates the Eighth or Fourteenth Amendment to the Constitution of the United States?

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States, which provides:

> "Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted."

It also involves the Due Process Clause of the Fourteenth Amendment.

It further involves the following provisions of the statutes of Louisiana.



La. Rev. Stat. Ann. §14:30 (1974). *"First degree murder.* First degree murder is the killing of a human being:

(1) When the offender has a specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated rape or armed robbery; or

(2) When the offender has a specific intent to kill, or to inflict great bodily harm upon, a fireman or a peace officer who was engaged in the performance of his lawful duties; or

(3) Where the offender has a specific intent to kill or to inflict great bodily harm and has previously been convicted of an unrelated murder or is serving a life sentence; or

(4) When the offender has a specific intent to kill or to inflict great bodily harm upon more than one person; [or]

(5) When the offender has specific intent to commit murder and has been offered or has received anything of value for committing the murder.

For the purposes of paragraph (2) herein, the term peace officer shall be defined and include any constable, sheriff, deputy sheriff, local or state policeman, game warden, federal law enforcement officer, jail or prison guard, parole officer, probation officer, judge, district attorney, assistant district attorney or district attorneys' investigator.

Whoever commits the crime of first degree murder shall be punished by death."[1]

La. Rev. Stat. Ann. §14:30.1 (1974). *"Second degree murder.* Second degree murder is the killing of a human being:

[1]In 1975, §14.30(1) was amended to add the crime of aggravated burglary as a predicate felony for first degree murder. Act No. 327, West's La. Sess. L. Serv. 1975, at 570-571.

(1) When the offender has a specific intent to kill or to inflict great bodily harm; or

(2) When the offender is engaged in the perpetration or attempted perpetration of aggravated arson, aggravated burglary, aggravated kidnapping, aggravated escape, armed robbery, or simple robbery, even though he has no intent to kill.

Whoever commits the crime of second degree murder shall be imprisoned at hard labor for life and shall not be eligible for parole, probation or suspension of sentence for a period of twenty years."[2]

La. Rev. Stat. Ann. §14:31 (1974). "*Manslaughter.* Manslaughter is:

(1) A homicide which would be murder under either Article 30 (first degree murder) or Article 30.1 (second degree murder), but the offense is committed in sudden passion or heat of blood immediately caused by provocation sufficient to deprive an average person of his self control and cool reflection. Provocation shall not reduce a homicide to manslaughter if the jury finds that the offender's blood had actually cooled, or that an average person's blood would have cooled, at the time the offense was committed; or

(2) A homicide committed, without any intent to cause death or great bodily harm.

(a) When the offender is engaged in the perpetration or attempted perpetration of any felony not enumerated in Articles 30 or 30.1, or of any intentional misdemeanor directly affecting the person; or

[2]In 1975, §14:30.1 was amended to increase the period of parole ineligibility from twenty to forty years following a conviction for second degree murder. Act. No. 380, West's La. Sess. L. Serv. 1975, at 665.



(b) When the offender is resisting lawful arrest by means, or in a manner, not inherently dangerous, and the circumstances are such that the killing would not be murder under Articles 30 or 30.1.

Whoever commits manslaughter shall be imprisoned at hard labor for not more than twenty-one years."

La. Rev. Stat. Ann. §15:567 (1967). "*Conditions precedent to execution; warrant of governor.*

No person sentenced to death shall be executed until a certified copy of the indictment, verdict and sentence shall have been sent to the governor, and a warrant shall have been issued by him, under the seal of the state, directed to the warden of the Louisiana State Penitentiary at Angola, commanding the warden to cause the execution to be done on the person so condemned in all things according to the judgment against him, and upon the date named in said warrant."

La. Rev. Stat. Ann. §15:568 (1975 supp.) "*Execution of death sentence; prior confinement of offender.*

The director of the Department of Corrections, or a competent person selected by him, shall execute the offender in conformity with the death warrant issued in the case. Until the time of his execution, the Department of Corrections shall incarcerate the offender in a manner affording maximum protection to the general public, the employees of the department, and the security of the institution."

La. Rev. Stat. Ann. §15:569 (1967). "*Place for execution of death sentence; manner of execution.*

Every sentence of death imposed in this state shall be by electrocution; that is, causing to pass through the body of the person convicted a

current of electricity of sufficient intensity to cause death, and the application and continuance of such current through the body of the person convicted until such person is dead. Every sentence of death imposed in this state shall be executed at the Louisiana State Penitentiary at Angola. Every execution shall be made in a room entirely cut off from view of all except those permitted by law to be in said room."

La. Rev. Stat. Ann. §15:570 (1975 supp.). "*Officials and witnesses present at execution; minors excluded.*

Every execution of the death sentence shall take place in the presence of the warden of the Louisiana State Penitentiary at Angola, or a competent person selected by him, the coroner of the parish of West Feliciana, or his deputy, and a physician summoned by the warden of the Louisiana State Penitentiary at Angola, the operator of the electric chair who shall be a competent electrician who shall have not been previously convicted of a felony, a priest or minister of the gospel, if the convict so requests it, and not less than five nor more than seven other witnesses, all citizens of the State of Louisiana; no person under the age of eighteen years shall be allowed within said execution room during the time of execution."

La. Code Crim. Proc. Ann., art. 598 (1975 supp.). "*Effect of verdict of lesser offense.*

When a person is found guilty of a lesser degree of the offense charged the verdict or judgment of the court is an acquittal of all greater offenses charged in the indictment and the defendant cannot thereafter be tried for those offenses on a new trial."

La. Code Crim. Proc. Ann., art. 803 (1967). "*Same [General charge; scope]; charge as to included minor offenses and plea of insanity.*



When a count in an indictment sets out an offense which includes other offenses of which the accused could be found guilty under the provisions of Article 814 or 815 the court shall charge the jury as to the law applicable to each offense. . ."

La. Code Crim. Proc. Ann., art. 809 (1967). "*Judge to give jury written list of responsive verdicts.*

After charging the jury, the judge shall give the jury a written list of the verdicts responsive to each offense charged, with each separately stated. The list shall be taken into the jury room for use by the jury during its deliberation."

La. Code Crim. Proc. Ann., art. 814 (1975 supp.). "*Responsive verdicts; in particular.*

A. The only responsive verdicts which may be rendered where the indictment charges the following offenses are:

1. First Degree Murder:
   Guilty.
   Guilty of second degree murder.
   Guilty of manslaughter.
   Not guilty. . . ."

La. Code Crim. Proc. Ann., art. 817 (1975 supp.). "*Qualifying verdicts.*

Any qualification of or addition to a verdict of guilty, beyond a specification of the offense as to which the verdict is found, is without effect upon the finding."

## STATEMENT OF THE CASE

Following a jury trial in the Fourteenth Judicial District Court, Parish of Calcasieu, petitioner, Stanislaus "Tony" Roberts, a 26-year old black man, was

sentenced on September 30, 1974, to die for the first degree murder of a service station attendant, Mr. Richard G. Lowe.

Mr. Lowe was found dead by a truck driver "around three, four or five o'clock in the morning" (R.8),[3] on August 18, 1973 in the office of a Texaco service station in Lake Charles, Louisiana (R. 6, 8, 14). He had been shot four times in the head[4] (R.27) with a .38 caliber pistol which the service station owner, Mr. O. P. Hebert, kept in a drawer near the cash register (R. 37). The police, who arrived at the station at 5:08 a.m. (R. 56), recovered "four spent projectiles" from a .38 caliber pistol (R. 45).

Approximately six months later, on February 12, 1974, (R. 63, 64), the police recovered Mr. Hebert's pistol[5] from one John Stallworth (R.63), the owner of a "[c]afe and beer parlor" (R. 81) in Lake Charles, who was being investigated because he allegedly had some stolen television sets and stolen pistols in his possession (R. 66). Mr. Stallworth voluntarily relinquished the revolver (R. 69), which he said he had

[3]As of the time of the filing of this brief, the record below has not been printed as an appendix. References to the 224 page trial transcript will hereinafter be prefaced by "R".

[4]A pathologist testified that Lowe, who had an artificial right forearm (R. 30), also had a "fifth possible entry wound" (R. 32) made by a bullet on the right shoulder.

[5]This pistol was "an uncommon-type gun," (R. 70), a "colt police positive .38 caliber revolver," (R. 51), which had been sold to Hebert by a police officer who was also a licensed gun dealer (R. 37, 51). After the Lowe shooting, "the entire police force or city police or detectives . . . had been asked to be on the look out for the odd looking gun[.]" (R. 69.)



taken away from one Michael Williams (R. 82) some months earlier (R. 86):

> "[w]e were gambling in a back room of mine. There come up a misunderstanding. He made an effort for it, and I reached to him and taken it from him."

(R. 82.)[6] Williams had "left running" (R. 85) from the lounge.

The police immediately arrested Michael Williams for the first degree murder of Richard G. Lowe (R. 96, 106) and subsequently held him as a "material witness" (R. 88).[7] He gave a statement on March 5, 1974 which indicated that he had obtained from petitioner the gun which Stallworth took away from him. Williams also stated that petitioner had attempted unsuccessfully to recover the gun from Stallworth because petitioner had used it to shoot a man during a service station robbery

[6]Mr. Stallworth did not return the pistol to Michael Williams because "I was afraid he might do me something with it." (R. 82.) Stallworth testified that he "[l]ocked it in the money box after this incident" (R. 85) and did not take it out again except "when I would go in there to move it around and put my change in the box." *(Ibid.)* None of Stallworth's employees had a key to the box. *(Ibid.)* Stallworth knew the gun was loaded when he took it away from Williams (R. 86), and although he forgot how many shells were in it, "the same shells was in it when I returned it over to the officers that was in it when I taken it" *(ibid.)* The pistol had five cartridges in it when the police recovered it. (R. 64.)

[7]Williams was given a lie detector test and "passed" (R. 106); the first degree murder charge against him was dropped after he appeared before a grand jury investigating Mr. Lowe's murder, but he continued to be held in jail as a "material witness to this crime" until he testified at petitioner's trial *(ibid.)*

(R. 105).[8] Petitioner and three other persons—Huey Cormier, Everett Walls, and Calvin Arceneaux—were subsequently arrested for complicity in the Lowe murder.[9]

On May 9, 1974, petitioner was charged with the crime of first degree murder in an indictment alleging

[8]Williams gave the police the following account: "when Tony [petitioner] drove up there at John Stallworth's place, I left and went and sat in Tony's car and Tony said I'm going to get my gun. I saw Tony go into John's and later came out. I ran it down to Tony in the car about the gun. Later on me and Tony were walking down the street and Tony said the main reason I want to get it is I believe it's hot you know. Then he said you see this little station over here, we were passing at Boulevard and Belden, that old man that used to work at the station, I [petitioner] told him all I want is your money and he [petitioner] told me that he shot the man." (R. 105).

[9]On April 29, 1974, the Fourteenth Judicial District Court for the Parish of Calcasieu entered orders holding Cormier and Michael Williams on $15,000 bond as "absolutely essential" "witness[es] for the prosecution" in *State of Louisiana v. Toney* [sic] *Roberts*, Grand Jury Case, under the provisions of La. Rev. Stat. Ann. §15:257 (1975 supp.). (These orders are not part of the paginated trial transcript.)

Cormier had been picked up on April 26, 1974 (R. 151) and he gave a statement to the police on the same day (R. 149). Walls was picked up sometime in April, 1974, and gave a statement concerning the Lowe murder on April 12, 1974 (R. 177); he was charged with "burglary and theft" *(ibid.)* when he was arrested, and the police told him "[i]t was a possibility that I could be charged with accessory" in the Lowe murder (R. 178). Walls stated at petitioner's trial that he did not know whether he currently had an accessory to murder charge pending against him (R. 178-179). He further testified that he "didn't make a statement until after two other people made a statement." *(Ibid.)* Both Cormier and Walls testified for the State at petitioner's trial, *see* pp. 12-16 *infra*, and their statements were not introduced. The record does not reveal when Arceneaux was arrested, but he was subsequently charged with the second degree murder of Richard G. Lowe (R. 181, 184).



that on August 18, 1973, he "[d]id unlawfully with the specific intent to kill or to inflict great bodily harm, while engaged in the armed robbery of Richard G. Lowe commit first degree murder by killing one RICHARD G. LOWE, in violation of Section One (1) of LSA-R.S. 14:30." He pleaded not guilty, and his jury trial[10] commenced on September 18, 1974.

A ballistics expert testified that the four spent projectiles recovered by the police from the Texaco service station had been fired from the .38 caliber pistol obtained from John Stallworth. (R. 125.) He also testified that "bullet shavings or fragments" removed from Mr. Lowe's body were "the same type of material as the four projectiles are made of" *(ibid.)*. The pistol was introduced as State's Exhibit 12 (R. 37, 51, 63), and Stallworth confirmed that this was the pistol he had taken away from Michael Williams and subsequently surrendered to the police (R. 81-82).

The State then called Michael Williams. Williams repudiated his earlier statement, *see* page 9-10 *supra*, which was then introduced (R. 104) for impeachment purposes, over defense objection (R. 94-103), after the State claimed "surprise" (R. 97). His testimony at trial was that he had never before seen the pistol introduced as State's Exhibit 12 (R. 88-89), and that while he remembered a gambling argument (R. 89-90) in which Stallworth had taken away from him a gun that he had

[10]Over petitioner's objection, one venireman was excluded for cause on account of his religious scruples against the death penalty. *State of Louisiana v. Stanislaus Roberts*, Criminal Docket No. 4479-74, Fourteenth Judicial Court, Calcasieu Parish, Louisiana, Jury Selection Transcript (Sept. 16, 1974) at 2-4.

earlier obtained from petitioner (R. 90, 116), the pistol introduced by the State was "definitely not" (R. 91) the pistol petitioner had given him. Williams testified that he had unsuccessfully tried to get petitioner's pistol back from Stallworth (R. 92) but that petitioner had told him "it was all right" (R. 93) and "just don't worry about it" *(ibid.)* He testified that his signed March 5, 1974, statement was untrue, and he asserted that he made it out of fear of being prosecuted for first degree murder.[11] He flatly denied that the statement reflected what petitioner had told him relative to recovering petitioner's pistol (R. 108), and he said that he had "kind of exaggerated [in his March 5 statement] to get them on Tony's [petitioner's] back and get them off [his own] . . . back," (R. 116).

The State relied heavily on the testimony of Cormier, Walls, and Arceneaux. At the time of petitioner's trial, Huey Cormier was in jail[12] awaiting trial on theft

[11]Williams testified that "most of it [was correct.] A lot of it I actually didn't know. I tell you . .,. [three dots in transcript] I tell you the truth, I didn't know too much of nothing. I was charged with first degree murder. All I was hearing was life, twenty-five or any other kind of time. Actually, I was practically insane at the time, you know. . . . [T]hey [the police] acted like they wanted to charge me. . . . [A] lot of things which are stated are brought out and lengthed [sic] to a degree which you would consider as exaggerated really because actually it wasn't nothing that I knew, nothing that I didn't know. It was just the idea that I was trying to get things together so I could help myself because I was being charged with a crime. . . ." (R. 96, 107-108).

[12]Cormier stated that he had "a criminal record" but denied having served time in the penitentiary. (R. 140.)



and burglary charges. (R. 128.)[13] Cormier testified that just before midnight on August 17, 1973 (R. 130), petitioner had discussed with him "ripping off that old man at the [Texaco] station." Petitioner asked Cormier to go along, and indicated that Arceneaux was going to participate in the robbery. (R. 130.) Cormier refused this invitation but he saw Arceneaux walking across the street toward them. *(Ibid.)* Early the next morning, while it was still dark, Cormier was walking home from a bar (R. 132) when he happened to see Arceneaux fleeing from the front of the Texaco station (R. 133). He did not see petitioner at this time. (R. 142.) Cormier went on home and was in bed asleep when he heard a knock at his door. (R. 134.) He found petitioner outside in a condition Cormier described as "sweating" *(ibid.).* When Cormier asked petitioner why he was sweating, petitioner declared that "he had just shot that old man . . . at the filling station." (R. 134-135.) Cormier saw that petitioner had a ".38" which was "kind of dark," although he could not tell whether it was a revolver or an automatic. (R. 135.) He

[13]The record does not reflect the disposition of the accessory charge filed against Cormier in the Lowe murder case. The following exchange occurred during the cross-examination of Cormier:

> "Q [defense counsel] Why didn't you go make . . . [three dots in transcript] so, you waited until April the whatever it was you said you were picked up, 1974, to make a statement saying that Tony [petitioner] did it after you were charged with an accessory after the fact [to murder]; you made a statement saying you had nothing to do with it, Tony did it; is that right? That's what your statement says.
>
> A [Cormier] The statement that I made was only on the grounds so that I wouldn't get incriminated." (R. 151.)

saw petitioner later that day, after sunrise, and asked him whether "he had really did what he said," and petitioner replied that he had:

> "[h]e said . . . that he struggled with the old man, you know, that the old man had pulled a gun on him, and that he struggled with the old man and took the gun from him, you know, and shot him."

(R. 136.) Petitioner told Cormier that Arceneaux had accompanied him during the robbery. *(Ibid.)*[14]

At the time of petitioner's trial, Everett Walls was also in jail[15] awaiting trial on theft and burglary charges. Walls testified that he, Huey Cormier, and petitioner had discussed at his house "ripping off" the Texaco service station (R. 158, 164)[16] but that armed

[14]Cormier also testified that "at a later date" (R. 136), he had overheard a conversation between petitioner and Michael Williams in which Williams asked to borrow petitioner's gun (R. 137) because he wanted to go to John Starr's (Stallworth's) club to gamble (R. 138). Later that day, Cormier overheard *another* conversation between the two men in which petitioner stated that he had loaned the pistol to Williams. *(Ibid.)* The next day, Cormier talked to petitioner, and petitioner said that Stallworth had taken the gun away from Williams and that he, petitioner, wanted to retrieve it "because the gun had come out of the station." (R. 139.)

[15]Walls stated that he had been previously convicted of burglary and had served time in the penitentiary. (R. 154-155, 163.)

[16]Walls "discussed the fact about robbing, you know, any place and getting away with it and taking your chance of somebody describing you and this and that, and then I added the possibility of someone getting killed, you know, or something like this, and that way you would have a robbery charge and murder charge, and still there's a possibility, you know, of someone seeing you. I stated that it wasn't worth it, to forget about it, you know." (R. 162.) Walls stated that petitioner replied that "if it comes to that [someone getting killed], he would just have to, you know . . . just have to kill him." (R. 162-163.)



robbery was not his "thing" *(ibid.)*. Walls had been having "family difficulties" (R. 156) and had been keeping the house of his "old lady" (R. 157) under surveillance because he suspected her of "going out on [him]. . . ." *(Ibid.)* Her house was near the Texaco station, and Walls happened to be watching it during the early morning hours of August 18, 1973. *(Ibid.)* As he walked by the lighted (R. 173) station, he saw petitioner who had a pistol in his hand (R. 160), and Calvin Arceneaux inside. (R. 159.) He did not see the filling station attendant. (R. 159.) Walls "just looked and kept on going. It wasn't any of my business." (R. 160.) A few minutes later, he heard shots *(ibid.)* and looked back at the station to see Arceneaux and petitioner running away in different directions. (R. 161.)[17]

[17]The following exchange occurred during the cross-examination of Walls:

> "Q [defense counsel] This thing occurred on August 18, 1973. You waited until April of 1974 to make a statement. Why is that?
>
> A [Walls] I'll put it this way, the places I'd been, you know, you learn to keep your, you know, stay out of other people's business.
>
> Q All right, fine. Why, on April 12th, you all [sic] of a sudden make it your business to sign a statement on Tony?
>
> A Because of the fact that to clear myself, you know, saying that I wasn't involved in it in any kind of way.
>
> Q In other words, you were picked up in conjunction with his, in connection with this armed robbery, I mean this murder, you were picked up; is that right?
>
> A I don't know whether I was picked up for it or not, you know.
>
> Q Well, what did they pick you up for?
>
> A I know I was picked up for burglary and theft, but I don't know if I was picked up for it or not.

*(continued)*

At the time of petitioner's trial, Calvin Arceneaux was in jail[18] and charged with the second degree murder of Richard G. Lowe. (R. 181.) He testified that on the early morning of August 18, 1973, petitioner went to the Texaco station and asked the attendant, Richard G. Lowe, for work. (R. 187.) Petitioner and Arceneaux left when Mr. Lowe told them that there were no jobs available, but they crept back into the station office through a rear entrance when Lowe was outside waiting on a car. *(Ibid.)* Arceneaux "crawled on the floor and got the [pistol]" (R. 187) from a desk drawer (R. 188). Petitioner then asked for the pistol:

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*(footnote continued from preceding page)*

Q Were you ever charged with anything . . . [in] conjunction with this murder, you and Huey Cormier?

A I couldn't say whether I was or not. I don't know whether I was charged with it or not.

Q Was accessory to murder ever mentioned to you?

A Yes, it was. It was a possibility that I could be charged with accessory.

Q So they even mentioned the fact that there was a possibility that you were going to be charged with accessory to murder; is that right?

A Not a possibility that I was going to be charged with accessory to murder; it was a possibility that I could be charged with it.

Q So, when this happened you volunteered to make a statement?

A No, sir; I didn't make a statement until after two other people made a statement."

(R. 177-178).

[18]Arceneaux stated that he had been convicted of burglary, theft, and attempted armed robbery in Mississippi and Louisiana and that he had served time in the penitentiary of both States. (R. 185-186.)



"[h]e was kind of mad when I had it. He just said he wanted it because he had never killed a white dude before, and he always wanted to kill a white dude." (R. 190.) When the attendant returned, petitioner, who now had the pistol, grabbed him by the collar and Arceneaux hit him with his fist as they pushed him into a small back room. (R. 191-192.) The two intruders prevented the attendant from retrieving another pistol which was in a filing cabinet in the back room. (R. 192.) Arceneaux was in the back room with petitioner and the attendant for about five minutes (R. 191), when a car drove up. (R. 192.) Arceneaux then went out and posed as the service station attendant, giving the motorist approximately three dollars worth of gas. (R. 192, 203.) After about three minutes, Arceneaux heard four shots from inside the service station. (R. 192.) When he reentered the station, he found Mr. Lowe shot and bleeding on the floor and petitioner gone. (R. 193.) He grabbed some "money bags" (which proved to be empty) and ran rapidly out of the station. *(Ibid.)* At trial Arceneaux denied any intention to kill the attendant: "[petitioner] told me we was supposed to be going in for a robbery." (R. 194.) He stated that he was not armed when they first entered the station and, as far as he knew, petitioner was not armed: "If he [petitioner] had something I didn't know" (R. 200). In accordance with Louisiana's "responsive verdict" procedure, see pp. 20-29 *infra*, the trial court instructed the jury that it could find petitioner guilty of first degree murder, guilty of second degree murder, guilty of manslaughter, or not guilty.[19] The jury found petitioner guilty of

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[19]*State of Louisiana v. Stanislaus Roberts*, No. 4479-74, Fourteenth Judicial District Court, Parish of Calcasieu, Louisiana, Trial Court's Instructions at 6-12. The trial judge's charge is separately paginated and is not part of the trial transcript.

first degree murder, and the trial court sentenced him to death. On September 5, 1975, the Supreme Court of Louisiana affirmed this death sentence, with two Justices dissenting. *State v. Roberts,* 319 So.2d 317 (La. 1975).

## HOW THE CONSTITUTIONAL QUESTION WAS PRESENTED AND DECIDED BELOW

On appeal to the Supreme Court of Louisiana, petitioner's Assignment of Error No. 4 asserted that "[t]he penalty of death, which was the sentence imposed upon the defendant, constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments of the United States Constitution," and his Assignment of Error No. 5 asserted that "[t]he Statute under which the defendant was tried and convicted is unconstitutional because the jury is empowered to return a responsive verdict of second degree murder or manslaughter, which do not carry a death penalty; therefore, the jury maintains the power to apply the death penalty in a discriminatory manner in violation of the United States Supreme Court decision in the case of *Furman v. Georgia.*" *State of Louisiana v. Stanislaus Roberts,* No. 4479-74. Fourteenth Judicial District Court, Parish of Calcasieu, Assignment of Errors. The Supreme Court of Louisiana explicitly rejected this contention and sustained the constitutionality of petitioner's death sentence, citing its earlier decisions in *State v. Hill,* 297 So.2d 660 (La. 1974) and *State v. Selman,* 300 So.2d 467 (La. 1974). *State v. Roberts,* 319 So.2d 317, 321-322 (La. 1975).



## SUMMARY OF ARGUMENT

### I.

Louisiana's 1973 capital punishment legislation, while ostensibly making the punishment of death "mandatory" for capital crimes, perpetuates the unfettered power of the jury to spare or doom a convicted capital defendant in any case by requiring that a set of "responsive" verdicts, including non-capital verdicts, be submitted to the jury's choice regardless of the evidence. There is simply "no distinction between qualification of a single verdict which permits discretion as to death or imprisonment and a responsive verdict scheme which may be used to discretionarily accomplish discriminatory application of the death penalty." *State v. Selman,* 300 So.2d 467, 477 (La. 1974) (dissenting opinion of Mr. Justice Barham).

This *de facto* sentencing discretion is only one of a number of mechanisms by which Louisiana law and practice permit indistinguishable offenders to be routed arbitrarily to prison or to execution. The 1973 legislation leaves prosecutorial charging and plea bargaining discretion wholly uncontrolled. Because of the amorphous distinctions between capital and non-capital grades of offenses, prosecutors as well as jurors must necessarily make sentencing decisions on an *ad hoc, ad hominem* basis in the guise of degree-of-guilt determinations. Finally, executive power to commute—or to decline capriciously to commute—capital sentences remains unregulated. Such a procedural system for imposing the harshest of all criminal sanctions inflicts unconstitutional cruel and unusual punishment. *Furman v. Georgia,* 408 U.S. 238 (1972).

II.[20]

The perpetuation of arbitrariness in post-*Furman* capital punishment schemes is not mere happenstance. The death penalty is too cruelly intolerable for our society to apply it regularly and even-handedly; and it is inherently too purposeless and irrational to be applied selectively on any reasoned, non-invidious basis. None of the justifications advanced to support the cruelty of killing a random smattering of prisoners annually survives examination in the light of the realities of this insensate lottery; and none begins, of course, to justify the killing of any particular human being while his indistinguishable counterparts are spared in numbers that attest to our collective abhorrence of what we are doing to an outcast few.

## INTRODUCTION

### I.

The trial of criminal cases in Louisiana is governed by a set of statutory provisions that prescribe the various "responsive verdicts" which a jury may render following the submission of any particular offense.[21] Where the charge is murder, for example, Article 814 of the Louisiana Code of Criminal Procedure as it existed prior to 1973 permitted the jury to return responsive verdicts of guilty, guilty without capital punishment,

[20]This point incorporates by reference the submissions made in petitioners' briefs in *Fowler v. North Carolina*, No. 73-7031 and *Jurek v. Texas*, No. 75-5394.

[21]La. Code Crim. Proc. Ann., arts. 814-817 (1967). As we shall see, some of the subsections of these articles were amended in 1973, and the current versions appear in the 1975 supplement.



guilty of manslaughter, or not guilty.[22] At that time, Louisiana had four capital crimes: murder, aggravated rape, aggravated kidnapping and treason.[23] In addition to the other responsive verdicts specified for each of these offenses, Articles 814 and 817 (as they then were) permitted the jury "[i]n a capital case [to] . . . qualify its verdict of guilty with the addition of the words 'without capital punishment,' in which case the punishment [was] . . . imprisonment at hard labor for life."[24]

In the wake of *Furman v. Georgia*, 408 U.S. 238 (1972), this Court reversed a number of death sentences that had been imposed for the crimes of murder and aggravated rape pursuant to the procedures just

[22]La. Code Crim. Proc. Ann., art. 814 (1967).

[23]La. Stat. Ann. §14:30 (murder), §14:42 (aggravated rape); §14:44 (aggravated kidnapping), §14:113 (treason) (1974).

[24]The quoted language appeared in La. Code Crim. Proc. Ann., art. 817 (1967). It was implemented by the inclusion of "guilty without capital punishment" among the responsive verdicts enumerated by La. Code Crim. Proc. Ann., art. 814 (1967), for the offenses of murder, aggravated rape and aggravated kidnapping. Then, as now, treason was not one of the crimes for which article 814 specified responsive verdicts; rather, treason was (and is) governed by the catch-all provision of La. Code Crim. Proc. Ann., art. 815 (1967), note 32 *infra*. Article 817 was therefore the sole source of authority for the submission of a verdict of "guilty without capital punishment" in treason cases. A second paragraph of Article 817 provided:

> "In noncapital cases, any qualification of or addition to a verdict of guilty, beyond a specification of the offense as to which the verdict is found, is without effect upon the finding."

described.[25] Subsequent similar decisions of the Louisiana Supreme Court[26] confirmed the plain meaning of this Court's orders: that the pre-*Furman* Louisiana death-penalty statutes had been invalidated by *Furman*. In 1973, the Louisiana Legislature reacted and sought to reinstitute capital punishment by enacting legislation[27] which, *inter alia*, (1) divided the

[25]*Sinclair v. Louisiana*, 408 U.S. 939, *on remand sub nom. State v. Sinclair*, 263 La. 377, 268, So.2d 514 (1972); *Poland v. Louisiana*, 408 U.S. 936, *on remand sub nom. State v. Poland*, 263 La. 269, 268 S.2d 221 (1972); *Johnson v. Louisiana*, 408 U.S. 932, *on remand sub nom. State v. Singleton*, 263 La. 267, 268 So.2d 220 (1972); *Williams v. Louisiana*, 408 U.S. 934, *on remand sub nom. State v. Williams*, 263 La. 284, 268 So.2d 227 (1972); *Square v. Louisiana*, 408 U.S. 938, *on remand sub nom. State v. Square*, 263 La. 291, 268 So.2d 229 (1972); *Douglas v. Louisiana*, 408 U.S. 937, *on remand sub nom. State v. Douglas* 263 La. 294, 268 So.2d 231 (1972); *McAllister v. Louisiana*, 408 U.S. 934, *on remand sub nom. State v. McAllister*, 263 La. 296, 268 So.2d 231 (1972); *Strong v. Louisiana*, 408 U.S. 937, *on remand sub nom. State v. Strong*, 263 La. 298, 268 So.2d 232 (1972); *Marks v. Louisiana*, 408 U.S. 933, *on remand sub nom. State v. Marks*, 263 La. 355, 268 So.2d 253 (1972).

[26]*See, e.g., State v. Franklin*, 263 La. 344, 268 So.2d 249 (1972); *State v. Hayes*, 271 So.2d 525 (La. 1973); *State v. McCauley*, 272 So.2d 335 (La. 1973); *State v. Curry*, 263 La. 997, 270 So.2d 484 (1972); *State v. Jones*, 263 La. 1012, 270 So.2d 489 (1972); *State v. Refuge*, 264 La. 135, 270 So.2d 842 (1972); *State v. Thomas*, 310 So.2d 517 (La. 1975); *State v. Quinn*, 288 So.2d 605 (La. 1974).

[27]The following statutes were enacted:

(1) La. Acts 1973, Act 109 (amending La. Rev. Stat. Ann. §14:30 (1967)) defined the capital crime of first degree murder. Previously Louisiana had not recognized degrees of murder.

(2) La. Acts 1973, Act 110 (amending La. Rev. Stat. Ann. §14:29 (1967)) divided "criminal homicide" into four grades: first degree murder, second degree murder, manslaughter, negligent homicide. Previously, Louisiana had divided "criminal homicide" into murder, manslaughter and negligent homicide.

(3) La. Acts 1973, Act 111 (enacting La. Rev. Stat. Ann. §14:30.1 (1974) defined a new non-capital crime of second degree murder. *(continued)*



previously unitary crime of murder into two degrees and defined them, (2) included "guilty of second degree murder" in the roster of responsive verdicts for the capital crime of first degree murder, and (3) abolished the verdict of "guilty without capital punishment" for all capital offenses. Under the 1973 enactments, four capital crimes are preserved: first degree murder,[28]

*(footnote continued from preceding page)*

(4) La. Acts 1973, Act 125 §1 (amending La. Code Crim. Proc. Ann. art. 817 (1967)) abolished the jury's power to qualify a capital verdict with the words "without capital punishment."

(5) La. Acts 1973, Act 126 §1 (amending La. Code Crim. Proc. Ann. art. 814 (1967)) defined the verdicts which would be "responsive" to a capital charge, omitting the verdicts "Guilty without capital punishment" in cases where a defendant is charged with first degree murder, aggravated rape, and aggravated kidnapping, and adding the verdict of "Guilty to second degree murder" in cases where a defendant is charged with first degree murder.

(6) La. Acts 1973, Act 127 (amending La. Rev. Stat. Ann. §14:31 (1967)) made a technical adjustment in the definition of manslaughter.

(7) La. Acts 1973, Act 128 §1 (amending La. Code Crim. Proc. Ann. art. 465 (1967)) provided specific indictment forms for first degree murder and for second degree murder.

(8) La. Acts 1973, Act 133 (amending La. Code Crim. Proc. Ann. art. 598 (1967)) altered the article defining the effect of a verdict of conviction of a lesser offense by deleting the sentence: "When a jury returns a verdict of guilty without capital punishment, the defendant cannot thereafter on a new trial be sentenced to death."

(9) La. Acts 1973, Act 134 §1 (amending La. Code Crim. Proc. Ann. art. 557 (1967)) altered the article prohibiting guilty pleas to capital offenses by deleting the sentence: "The defendant, with the consent of the district attorney, may plead 'guilty without capital punishment.' "

[28]The capital first degree murder provision is set forth in the text at page 3 *supra*.

aggravated rape,[29] aggravated kidnapping,[30] and treason.[31] Provision continues to be made concerning the responsive verdicts that must be offered for the jury's

[29]La. Rev. Stat. Ann. §14:42 (1975 supp.), as most recently amended in 1975, Act No. 612 West's La. Sess. L. Serv. 1975 at 974, provides:

"§42. *Aggravated rape*

"Aggravated rape is a rape, heterosexual or homosexual, committed where the sexual intercourse is deemed to be without the lawful consent of the victim because it is committed under any one or more of the following circumstances:

"(1) Where the victim resists the act to the utmost, but whose resistance is overcome by force;

"(2) Where the victim is prevented from resisting the act by threats of great and immediate bodily harm, accompanied by apparent power of execution;

"(3) Where the victim is under the age of twelve years. Lack of knowledge of the victim's age shall not be a defense.

"Whoever commits the crime of aggravated rape shall be punished by death."

[30]La. Rev. Stat. Ann. §14:44 (1974) provides:

"§44. *Aggravated kidnapping*

"Aggravated kidnapping is the doing of any of the following acts with the intent thereby to force the victim, or some other person, to give up anything of apparent present or prospective value, or to grant any advantage or immunity, in order to secure a release of the person under the offender's actual or apparent control:

"(1) The forcible seizing and carrying of any person from one place to another; or

"(2) The enticing or persuading of any person to go from one place to another; or

"(3) The imprisoning or forcible secreting of any person.

"Whoever commits the crime of aggravated kidnapping shall be punished by death; provided that if the kidnapped person is liberated unharmed before sentence is imposed

*(continued)*



choice whenever any of these capital crimes is charged.[32] The responsive verdicts include noncapital

*(footnote continued from preceding page)*

then the sentence of death shall not be given but the offender shall be sentenced to life imprisonment at hard labor."

[31]La. Rev. Stat. Ann. §14:113 (1974) provides:

"§113. *Treason*

"Treason is the levying of war against the United States or the State of Louisiana, adhering to enemies of the United States or of the State of Louisiana, or giving such enemies aid and comfort.

"No person shall be convicted of treason except on the testimony of two witnesses to the same overt act, or on his own confession in open court.

"Whoever commits the crime of treason shall be punished by death."

[32]The responsive verdict provisions relating to first degree murder are set out in the text at page 29 *infra*. With regard to aggravated rape, La. Code Crim. Proc. Ann., art. 814(A) (1975 supp.) authorizes the following responsive verdicts:

"8. Aggravated Rape:
"Guilty;
"Guilty of attempted aggravated rape;
"Guilty of simple rape;
"Guilty of forcible rape;
"Guilty of attempted forcible rape;
"Not guilty

The two responsive verdicts concerning forcible rape were added in 1975. Act. No. 334, West's La. Sess. L. Serv. 1975 at 579. With regard to aggravated kidnapping, La. Code Crim. Proc. Ann., art. 814(A) (1975 supp.) authorizes the following responsive verdicts:

"15. Aggravated Kidnapping:
"Guilty.
"Guilty of simple kidnapping.
"Not guilty."

Treason is not one of the offenses for which responsive verdicts are enumerated in Article 814, and so it is governed by La. Code Crim. Proc. Ann., art. 815 (1967):

*(continued)*

convictions,[33] but a verdict finding the defendant guilty of the capital offense itself "without capital

*(footnote continued from preceding page)*

"In all cases not provided for in Article 814, the following verdicts are responsive.

"(1) Guilty;

"(2) Guilty of a lesser and included grade of the offense even though the offense charged is a felony, and the lesser offense a misdemeanor; or

"(3) Not guilty."

[33]The noncapital convictions that may be returned as responsive verdicts under a charge of first degree murder are discussed at pages 50-65, *infra*. As indicated in note 32 *supra*, among the noncapital convictions that are responsive verdicts to a charge of aggravated rape are *attempted aggravated rape* and *simple rape*. The latter is defined by La. Rev. Stat. Ann. §14:43, Act. No. 612, West's La. Sess. L. Serv. 1975 at 974, as most recently amended in 1975:

"§43, *Simple rape*

"Simple rape is a rape, heterosexual or homosexual, committed where the sexual intercourse is deemed to be without the lawful consent of the victim because it is committed under any one or more of the following circumstances:

"(1) Where the victim is incapable of resisting or of understanding the nature of the act by reason of stupor or abnormal condition of the mind produced by an intoxicating, narcotic, or anesthetic agent, administered by or with the privity of the offender; or when victim has such incapacity, by reason of a stupor or abnormal condition of mind from any cause, and the offender knew or should have known of the victim's incapacity;

"(2) Where the victim is incapable, through unsoundness of mind, whether temporary or permanent, of understanding the nature of the act; and the offender knew or should have known of the victim's incapacity.

"(3) Where, in a case of heterosexual rape, the female person submits under the belief that the person committing the act is her husband and such relief is intentionally induced by any artifice, pretense, or concealment practiced by the offender.

*(continued)*



punishment" is no longer allowed.[34] The 1973 legislative package makes no other relevant alteration in

*(footnote continued from preceding page)*

"Whoever commits the crime of simple rape shall be imprisoned at hard labor for not less than one nor more than twenty years."

*Simple kidnapping*, the noncapital conviction which is a responsive verdict to the charge of aggravated kidnapping, note 32 *supra* is defined by La. Rev. Stat. Ann. §14:45 (1974):

"§45. *Simple kidnapping*

"A. Simple kidnapping is:

"(1) The intentional and forcible seizing and carrying of any person from one place to another without his consent; or

"(2) The intentional taking, enticing or decoying away, for an unlawful purpose, of any child not his own and under the age of fourteen years, without the consent of its parent or the person charged with its custody; or

"(3) The intentional taking, enticing or decoying away, without the consent of the proper authority, of any person who has been lawfully committed to any orphan, insane, feeble-minded or other similar institution.

"(4) The intentional taking, enticing or decoying away and removing from the state, by any parent of his or her child, from the custody of any person to whom custody has been awarded by any court of competent jurisdiction of any state, without the consent of the legal custodian, with intent to defeat the jurisdiction of the said court over the custody of the child.

"(5) The taking, enticing or decoying away and removing from the state, by any person, other than the parent, of a child temporarily placed in his custody by any court of competent jurisdiction in the state, with intent to defeat the jurisdiction of said court over the custody of the child.

"B. Whoever commits the crime of simple kidnapping shall be fined not more than two thousand dollars or be imprisoned, with or without hard labor, for not more than five years, or both."

[34]La. Code Crim. Proc. Ann., art. 817 (1975 supp.), now provides:

"Any qualification of or addition to a verdict of guilty, beyond a specification of the offense as to which the verdict is found, is without effect upon the finding."

Louisiana's procedures for the pretrial, trial, or post-trial processing of capital cases.[35]

With specific regard to capital murder, La. Rev. Stat. Ann. §14:30 (1974) now provides that "[w]hoever commits the crime of first degree murder shall be punished by death." The same section defines the crime as:

> ". . . the killing of a human being:
>
> "(1) When the offender has a specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated rape, aggravated burglary, [36] or armed robbery; or
>
> "(2) When the offender has a specific intent to kill, or to inflict great bodily harm upon, a fireman or a peace officer who was engaged in the performance of his lawful duties; or
>
> "(3) Where the offender has a specific intent to kill or to inflict great bodily harm and has previously been convicted of an unrelated murder or is serving a life sentence; or
>
> "(4) When the offender has a specific intent to kill or to inflict great bodily harm upon more than one person; [or]
>
> "(5) When the offender has specific intent to commit murder and has been offered or has received anything of value for committing the murder."

Second degree murder is defined and punished by La. Rev. Stat. Ann. §14:30.1 (1974), which, at the time of petitioner's trial,[37] provided:

[35]Several minor technical provisions are described in note 27 *supra*.

[36]Aggravated burglary was added to §14:30(1) as a predicate felony in 1975, Act No. 327, West's La. Sess. L. Serv. 1975, at 570-571.

[37]*See* note 2, *supra*.



> "Second degree murder is the killing of a human being:
>
> "(1) When the offender has a specific intent to kill or to inflict great bodily harm; or
>
> "(2) When the offender is engaged in the perpetration or attempted perpetration of aggravated arson, aggravated burglary, aggravated kidnapping, aggravated escape, armed robbery, or simple robbery, even though he has no intent to kill.
>
> "Whoever commits the crime of second degree murder shall be imprisoned at hard labor for life and shall not be eligible for parole, probation or suspension of sentence for a period of twenty years."

And La. Code Crim. Proc. Ann., art. 814(A)(1)(1975 supp.), authorizes the following responsive verdicts in a first degree murder prosecution:

> "First Degree Murder:
> "Guilty.
> "Guilty of second degree murder.
> "Guilty of manslaughter.[38]
> "Not guilty."

The question presented by this case is whether the sentence of death imposed upon petitioner Stanislaus Roberts pursuant to Louisiana's post-*Furman* system for the administration of capital penalties constitutes a cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. We submit that it does, for two reasons. First, Louisiana's present capital-punishment scheme perpetuates a regime of arbitrary and capricious selectivity in the infliction of the

[38]The Louisiana law of manslaughter is discussed at pages 59-62 *infra*.

ultimate penalty and therefore falls afoul of *Furman*. (Part II, *infra*.) Second, the death penalty as Louisiana proposes to use it is a purposeless, historically repudiated butchery that cannot survive examination "in the light of contemporary human knowledge"[39] under constitutional principles which prohibit debasement of "the dignity of man."[40] (Part III, *infra*.)

## THE ARBITRARY INFLICTION OF DEATH

### II.

As we shall see shortly, numerous interconnected procedures and practices in the administration of Louisiana's 1973 death penalty laws assure that capital punishment will remain "a ghastly, brainless lottery."[41] These procedures and practices function together as a system for selecting some people to be killed while sparing others; and it would be misleading to focus exclusively upon any particular aspect of the system "as if it were . . . self-contained . . . rather than merely one decision in an ongoing process of interrelated decisions and consequences of decisions."[42] Nevertheless, some attention may usefully be directed at the outset to Louisiana's implementation of capital punishment

[39]*Robinson v. California*, 370 U.S. 660, 666 (1962).

[40]*Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion of Chief Justice Warren).

[41]West, *Psychiatric Reflections on the Death Penalty*, 45 AM. J. ORTHOPSYCHIATRY 689, 692 (1975).

[42]NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 150 (1966).



through its characteristic "responsive verdict" procedure. We begin with this subject *not* because juries' choices of responsive verdicts in capital cases mark the only (or even the most important) point of arbitrary selectivity within the system, but because an inspection of the way in which Louisiana law has filtered capital punishment through its "responsive verdict structure before and after 1973 highlights how little change was made by the legislation of that year.

Prior to 1973, all persons convicted of murder were potentially subject to being killed, but their deaths could be averted by a jury verdict of "guilty without capital punishment." After 1973, the death-eligible class consists of all persons convicted of first degree murder; the verdict that averts death is "guilty of second degree murder." The latter verdict, like the former, must be submitted for the jury's possible choice in *every* potentially capital murder case, regardless of the facts. *See* pages 50-52 *infra*.

Two changes thus were made in 1973, and only two. First, the range of cases in which the punishment of death *might* be inflicted was narrowed. Unlike the large majority of States which had already restricted capital punishment to the variously defined homicide subclass of first degree murder prior to *Furman*, Louisiana still made all murders potentially capital in 1972. Its 1973 legislation makes the potential applicability of the death penalty narrower, but not narrow. For example, under La. Rev. Stat. Ann. §14:30(1), page 28 *supra*, all killings with intent to kill or to inflict great bodily harm during the perpetration or attempted perpetration of the crimes of aggravated kidnapping, aggravated rape, aggravated burglary, or armed robbery are denominated first degree murder subject to capital punishment. The

enumerated felonies are far less confined than their names suggest,[43] and the "intent" requirement provides very little additional confinement inasmuch as (1)

[43]"Aggravated" kidnapping in Louisiana is distinguished from simple kidnapping by the presence of an "intent . . . to force the victim, or some other person, to give up anything of apparent present or prospective value, or to grant any advantage or immunity, in order to secure [the kidnapped individual's] . . . release," and may consist of "enticing or persuading . . . any person to go from one place to another" with this intent. *See* La. Rev. Stat. Ann. §14:44 (1974), set out in note 30 *supra*; and *compare* note 33 *supra*. "Aggravated" rape may be made out in any case in which "the victim resists the act to the utmost, but whose resistance is overcome by force," *or* "in which the victim is prevented from resisting the act by threats of great and immediate bodily harm, accompanied by the apparent power of execution." La. Rev. Stat. Ann. §14:42, as amended by Act No. 612, West's La. Sess. L. Serv. 1975 at 974, set out in note 29 *supra*. Louisiana Supreme Court decisions have, in equal measure, vitiated the requirement of resistance to the utmost, *see State v. Jackson*, 227 La. 642, 80 So.2d 105 (1955), and attenuated the concept of "threats" which render resistance unnecessary, *see State v. Douglas*, 256 La. 572, 237 So.2d 382 (1970). "Aggravated" burglary is the unauthorized entering of any inhabited dwelling or any structure where a person is present, with the intent to commit a felony or any theft, if the offender, (1) is armed with a dangerous weapon; or (2) after entering arms himself with a dangerous weapon; or (3) commits a battery upon any person while in such place or in entering or leaving. La. Rev. Stat. Ann. §14:60 (1974) This crime need not be committed at night, *State v. Glynn*, 217 La. 871, 47 So.2d 670, 671 (1950), and it is not essential that the person who inhabits the dwelling be present at the time of unauthorized entry, *State v. Hicks*, 286 So.2d 331, 332 (La. 1973). Armed robbery is essentially what its name implies: theft from the person (or in presence, *see State v. Refuge*, 300 So.2d 489 (La. 1974)) of another, by use of force or intimidation, "while armed with a dangerous weapon." La. Rev. Stat. Ann. §14:64 (1974).



Louisiana law permits juries to infer the relevant intent in any case where a dangerous weapon is employed,[44] and (2) neither trial courts nor appellate courts in Louisiana possess the power to review the sufficiency of evidence upon which jury findings of this (or any other element of an offense or the degree of an offense) purportedly rests.[45]

But whatever may be the exact parameters of subsection 14:30(1) or of "the other four subsections of [section] . . . 14:30,"[46] it is immediately evident that the 1973 circumscription of capital punishment to first degree murder does not assuage the concerns of *Furman*. For this Court has already applied *Furman* to invalidate the death penalty for a crime that was far more narrowly drawn than the present Louisiana crime of first degree murder because *within the class of those convicted of the crime* there remained room for

[44]*See* pp. 56-59 *infra*.

[45]A trial court may not grant a directed verdict for a defendant on the ground that the State's evidence is insufficient to sustain a conviction: to grant such a motion under La. Code Crim. Proc. Ann., art. 778 (1967), there must be "no evidence to prove a crime or an essential element thereof." *State v. Sonnier*, 317 So.2d 190, 192 (La. 1975). *Accord: State v. Pryor*, 306 So.2d 675, 676 (La. 1975). *See also State v. Douglas*, 278 So.2d 485, 491 (La. 1973). Moreover, mere insufficiency of the evidence does not provide a basis for review in the Louisiana Supreme Court: "[i]t is only in cases where there is *no* evidence of the crime or of an element of the crime that this Court has the power to find meritorious a motion for directed verdict and reverse a conviction. If the only issue is the *sufficiency* of the evidence to prove guilt beyond a reasonable doubt, this Court cannot review the determination of the jury. . . ." *State v. Evans*, 317 So.2d 168, 170 (La. 1975). *Accord: State v. Brumfield*, 319 So.2d 402, 404 (La. 1975).

[46]*State v. Roberts*, 319 So.2d 317, 322 (La. 1975).

arbitrary selectivity to inflict or avert death punishments.[47]

The second change worked by the 1973 legislation has been held by the Louisiana Supreme Court (with Justices Barham and Dixon dissenting) to avoid *Furman* on the latter account, since it makes " ' the death penalty . ... mandatory for first degree murder.' "[48] It is unclear whether this "mandatory" characterization is thought to render *Furman* inapplicable upon the mere mechanical ground that the jury's responsive verdict which now spares a defendant's life is cast in terms of a "degree" finding instead of a "punishment" finding,[49] or whether the Louisiana Supreme Court is saying here that the two findings differ operationally in a

[47] *Duling v. Ohio*, 408 U.S. 936 (1972), *rev'g State v. Duling*, 21 Ohio St.2d 13, 254 N.E.2d 670 (1970) (killing of a police officer while in the discharge of his duties). *See also People v. Fitzpatrick*, 32 N.Y.2d 499, 346 N.Y.S.2d 793, 300 N.E.2d 139 (1973) *Cf. People ex rel. Rice v. Cunningham*, ___ Ill.2d ___, 336 N.E.2d 1 (1975).

[48] *State v. Roberts*, 319 So.2d 317, 322 (La. 1975), quoting *State v. Hill*, 297 So.2d 660, 662 (La. 1975).

[49] The opinion of the Louisiana Supreme Court rejecting petitioner's contention that *Furman* invalidates Louisiana's present death-punishing system relies upon two prior decisions of the same tenor, *State v. Hill*, 297 So.2d 660 (La. 1974), and *State v. Selman*, 300 So.2d 467 (La. 1974). Portions of the *Selman* opinion, *id.* at 473, quoted in part in *State v. Roberts*, 319 So.2d 317, 322 (La. 1975), appear to say that the mere fact that Louisiana juries rendered explicit punishment verdicts prior to 1973 and degree (or grade) verdicts thereafter takes the case out of *Furman:* "[t]he reason for this argument [based on *Furman*] lacking merit is that the jury has no discretion in the imposition of the death penalty for aggravated rape. . . . We must bear in mind that attempted aggravated rape and simple rape are separate and distinct crimes with separate penalty provisions for each. The fact that death is the mandatory penalty for aggravated rape but not for the responsive verdicts of attempted aggravated rape and simple rape is of no moment. The sole determining factor as to which penalty will be imposed depends

*(continued)*



constitutionally significant way.[50] Obviously, the mechanical ground is untenable; *Furman* "is concerned with substance rather than this kind of formalism";[51] and if a simple verbal change in the form of the death-averting responsive verdict sufficed to lay *Furman* aside, "a State could undermine many of the interests that decision sought to protect without effecting any substantive change in its law."[52] Of course, if either the Louisiana Legislature or the Louisiana Supreme Court *has* made a "substantive change in [the] . . . law" by which potentially capital offenders are selected to die or live, *that* change could affect the applicability of *Furman*. But, for this purpose, the change would have

*(footnote continued from preceding page)*
on the particular crime for which the jury finds the accused guilty, if any." On the other hand, three sentences in the *Hill* opinion, as quoted in note 50 *infra*, appear to suggest that a jury's degree (or grade) determination differs in kind from a jury's explicit punishment determination. Other Louisiana Supreme Court decisions sustaining death sentences imposed under the 1973 statutory scheme add nothing substantive to *Hill*, *Selman*, and *Roberts*. *See State v. Wilson*, 315 So.2d 646 (La. 1975); *State v. Watts*, 320 So.2d 146 (La. 1975); *State v. Washington*, 321 So.2d 763 (La. 1975); *State v. Smith*, 322 So.2d 197 (La. 1975).

[50] *See* note 49 *supra*. The relevant sentences in *Hill* are: "The use of lesser verdicts [to convict a capitally-charged defendant of a noncapital degree or grade of the offense charged] . . . is contingent upon the jury finding insufficient evidence of first degree murder, with which he is charged. The jury is concerned only with guilt. It has no sentencing function." *State v. Hill*, 297 So.2d 660, 662 (La. 1974), quoted in part in *State v. Roberts*, 319 So.2d 317, 322 (La. 1975).

[51] *Mullaney v. Wilbur*, 421 U.S. 684, 699 (1975) (footnote omitted). *See also* the authorities cited in Brief for Petitioner in *Fowler v. North Carolina*, No. 73-7031, at p. 40.

[52] *Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975).

to be more than cosmetic: it could not consist of a mere pronouncement of what juries will do, or even of what juries *should* do, under the changed responsive-verdict label, if the new thing that juries are expected to do is implausible and if no operational change is made in the Louisiana procedures that control the jury's behavior. Federal constitutional rights cannot be protected by pious but unreal hopes that they will be observed in the absence of adequate procedures to preserve them. *Jackson v. Denno*, 378 U.S. 368 (1964); *Sims v. Georgia*, 385 U.S. 538 (1967).

These points serve to clarify the significance of the Louisiana Supreme Court's pronouncement that the death penalty is now mandatory in that State because "if a jury brings in a verdict of guilty [of a capital grade of an offense] . . . the jury does not have a choice of [explicit punishment] verdicts."[53] It is one thing to say that juries' "use of . . . lesser [responsive] verdicts [in lieu of a capital first degree murder verdict] . . . is contingent upon the jury finding insufficient evidence to convict the defendant of first degree murder, with which he is charged,"[54] and it is quite another thing to assure that juries will in fact behave in this way. As we shall see when we come to examine the actual procedures used for the trial of potentially capital cases in Louisiana, juries remain as free today as before *Furman* to take or spare the "capital" defendant's life whimsically and capriciously. (*See* pages 50-65 *infra.*)

But this arbitrary power given to juries is not the only point at which the realities of Louisiana practice

[53]*State v. Roberts*, 319 So.2d 317, 322 (La. 1975).

[54]*See* note 50 *supra.*



belie the purportedly "mandatory" character of the death penalty imposed upon petitioner. The notion that the death penalty is mandatory "if the jury brings in a verdict of guilty" of first degree murder[55] depends (in the vernacular) upon a very big "if"; and, even then, death is not by any means the inevitable or predictable outcome of the case. For "[d]iscretion permeates the entire criminal justice system, from police detection and arrest, through prosecutorial charging and plea negotiation, to jury deliberation, appellate reconsideration, and executive pardon";[56] and

> "[t]he change to a mandatory system will have the effect of shifting some of the discretion exercised by the jury to others, particularly the prosecutor and the executive. By obscuring the visibility of the discretionary judgments, this change can only increase the potential for arbitrary and discriminatory application of the death penalty."[57]

[55]*See* p. 36 *supra. See also State v. Selman*, 300 So.2d 467, 473 (La. 1974):

> "If the jury finds under the facts of the case, that the accused is guilty of [the capital grade of the offense] . . . , the death penalty shall be imposed. On the other hand, if the jury finds under the facts of the case that the accused is [guilty of a lesser offense] . . . , they will render a verdict for that particular crime. . . . Therefore, we conclude that there is no discretion in the jury for the imposition of the death penalty where the accused is found guilty of [the capital grade of the offense] . . . ."

[56]Garner, *The New Illinois Death Penalty: Double Constitutional Trouble*, 5 LOYOLA (CHI.) L.J. 351, 368 (1974). *See also* Petitioner's *Fowler* Brief, at pp. 44-45.

[57]White, *The Role of the Social Sciences in Determining the Constitutionality of Capital Punishment*, 13 DUQ. L. REV. 279, 289 n.69 (1974).

It is therefore necessary to examine the entire Louisiana process for handling "capital" cases in the light of the concerns of *Furman*. We turn to such an examination in the following subsections. However, because the Brief for Petitioner in *Fowler v. North Carolina*[58] [hereinafter cited as Petitioner's *Fowler* Brief] has already documented at considerable length the breadth and arbitrariness of the discretion exercised at all stages of capital prosecutions under the procedures common to Louisiana and other jurisdictions,[59] we shall spare the Court the burden of repetitious reading by restricting our discussion here to the specifics of Louisiana law and practice.

1. *Prosecutorial Discretion*

Article 61 of the Louisiana Code of Criminal Procedure Annotated (1967) provides that, subject to the limited supervision of the attorney general, "the district attorney has entire charge and control of every criminal prosecution instituted or pending in his district, and determines whom, when, and how he shall prosecute." The Louisiana Supreme Court has reiterated that "[i]t is within the exclusive province of the district attorney who is vested with full charge and contro of every criminal prosecution instituted or pending in any parish where he is district attorney, to determine whom, when and how he shall prosecute." *State v. Collins*, 242 La. 704, 138 So.2d 546, 550 (1962). *See also State v. Jourdain*, 225 La. 1030, 74

[58]No. 73-7031.

[59]*See* Petitioner's *Fowler* Brief, at pp. 41-101.



So.2d 203, 204 (1954); *Kemp v. Stanley*, 204 La. 110, 15 So.2d 1, 8 (1943) (on rehearing); *State ex rel. Bourg v. Marrero*, 132 La. 109, 61 So. 136, 143-149 (1913); *State v. Franton*, 319 So.2d 405, 406 (La. 1975); *Pier 1 Imports, Inc. v. Pitcher*, 270 So.2d 228, 229-230 (La. App. 1972), *writ denied*, 272 So.2d 696 (La. 1973).

> "The district attorney is regarded as the representative of the public and is solely responsible for the prosecution. He is accorded broad discretion in the selection of criminals and crimes to prosecute, on the theory that mechanical enforcement of the criminal laws is undesirable as well as impractical. The power of the district attorney not to prosecute is as extensive as his power to prosecute. The decision not to prosecute can be accomplished by mere inaction, acceptance of a compromise plea, or entry of a nolle prosequi."[60]

In recognizing the unreviewable discretion of the district attorney to initiate civil nuisance abatement suits, the Louisiana Court of Appeals reasoned from the settled criminal jurisprudence of the State when it wrote that

> "[i]n a civil action such as this, a district attorney certainly has no lesser latitude of discretion to

[60]Slovenko, *The Accusation in Louisiana Criminal Law*, 32 TULANE L. REV. 47, 50-51 (1957) (citations omitted). A district attorney has "a duty to make inquiry when informed of an offense, but there is no duty to prosecute." *Id.* at 51 n.19. One commentator has stated that Article 61 of the Louisiana Code of Criminal Procedure "continues the sound basic rule that the district attorney is in complete control of prosecutions in his district, with full authority to determine 'whom, when and how he shall prosecute.'" Bennett, *The 1966 Code of Criminal Procedure*, 27 LA. L. REV. 175, 177 (1967).

> determine when he shall bring the action to abate and to control the proceedings than in any criminal case. We do not agree with the contention of defendant's counsel that it was necessary that the legislature set forth 'any criterion or rules or standards under which the District Attorney will proceed.' "

*Langridge v. Gassenberger*, 183 So.2d 411, 413 (La. App. 1966). The decisions whether and when it is appropriate to seek and prosecute a capital indictment in the first instance–or whether and when it is appropriate to proceed upon available lesser charges–thus are committed to the unfettered discretion of the district attorney.

The district attorney also has unrestricted freedom to terminate criminal prosecutions.[61] Article 691 of the Louisiana Code of Criminal Procedure Annotated (1967) provides:

> "[t]he district attorney has the power, in his discretion, to dismiss an indictment or a count in an indictment, and in order to exercise that power it is not necessary that he obtain consent of the court."

This broad power has been frequently recognized. "[T]he prosecuting attorney has absolute control over his indictments before the issue is joined and the trial

[61] *See State v. Ferdinand*, 285 So.2d 530, 532 (La. 1973) (concurring opinion of Mr. Justice Summers):

> "Before the jury is impaneled the matter of dismissing a prosecution is entirely under the control of the district attorney, and after the jury has been impaneled, and before verdict, his authority to enter a nolle prosequi is subject only to the right of the defendant to insist upon a trial."



begun." *State ex rel. Butler v. Moise*, 48 La. Ann. 109, 18 So. 943, 953 (La. 1895). *See State v. Frazier*, 52 La. Ann. 1305, 27 So. 799, 801 (1900); *State v. Bugg*, 6 Rob. 63, 64 (La. 1845). The Louisiana Supreme Court has held that a district attorney need not obtain consent of the trial judge when he enters a *nolle prosequi:*

> "[t]here can be no doubt, of course, that the attorney general and the district attorneys of the State have absolute discretion to nolle prosequi any criminal case . . . [S]uch right has invariably been endorsed by the decisions of this Court. The broad powers vested in the district attorneys have long been recognized in our adjudications prior to the inclusion of . . . [Article 691] in our Code of Criminal Procedure. . . . 'In all stages of a criminal prosecution before a jury is impanelled the prosecuting attorney has an arbitrary control over his indictments, and may enter a nolle prosequi as to them, at pleasure, without the consent of the court or of accused.' "

*City of Lake Charles v. Anderson*, 248 La. 787, 182 So.2d 70, 71 (1966) (quoting MARR, CRIMINAL JURISPRUDENCE OF LOUISIANA 804 (1906).[62] *See also State v. Hingle*, 242 La. 844, 139 So.2d 205, 210 (1962) (on rehearing); *State v. Broussard*, 217 La. 90, 46 So.2d 48, 50 (1950); *State v. Kavanaugh*, 203 La. 1, 13 So.2d 366, 373 (1943). *Cf. State v. Milano*, 138 La. 989, 71 So. 131, 132 (1916).

Because of the more stringent procedural requirements imposed upon capital prosecutions under

[62] If a jury has been impanelled, however, a district attorney must secure the consent of the defendant before he dismisses an indictment. *State v. Bracklin*, 113 La. 879, 37 So. 863 (1905). *Accord: Farrar v. Steele*, 31 La. Ann. 640, 642 (1879).

Louisiana law,[63] district attorneys will frequently be motivated not to make (or to dismiss) capital charges except in cases where they strongly feel that the defendant *deserves* to die or that "the community generally approves"[64] prosecutorial pursuit of the extreme penalty. For example, under Article 782(A) of the Louisiana Code of Criminal Procedure, all twelve jurors must concur in a first degree murder verdict *or* in

[63]Other practical considerations may make the non-capital route more attractive to a prosecutor. For example, a district attorney need not present his case to the grand jury if he wishes to proceed on a manslaughter charge. La. C. Crim. Proc. art. 382 (1975 supp.). In an appendix to its decision in *State v. Holmes*, 269 So.2d 207, 210 (La. 1972), the Louisiana Supreme Court set forth some of the considerations which might make a district attorney prefer a non-capital charge; *e.g.*, necessity to initiate prosecution by indictment in capital case or case where crime is punishable by life imprisonment, La. Constitution of 1974, Art. 1, §15 (1974 West separate supp.); necessity to sequester jurors in capital case after each juror is sworn, La. Code Crim. Proc. Ann., art. 791 (1967); necessity to use district court for preliminary examination in capital cases, La. Code Crim. Proc. Ann., art. 291 (1967); necessity to assign defense counsel who have at least five years experience in capital cases, La. Code Crim. Proc. Ann., art. 512 (1967); impossibility of defendant waiving jury trial in a capital case, La. Code Crim. Proc. Ann., art. 780 (1975 supp.); necessity for unanimous verdict of twelve-person jury in capital cases, La. Code Crim. Proc. Ann., art. 782(A) (1975 supp.); allowance of twelve peremptory challenges to defendant in capital case or case where punishment is "necessarily imprisonment at hard labor", La. Code Crim. Proc. Ann., art. 799 (1967); ability of capital defendant to object "to his temporary voluntary absence at all stages of proceedings against him, even if his counsel was present, La. Code Crim. Proc. Ann., art. 832 (1967).

[64]Worgan & Paulsen, *The Position of a Prosecutor in a Criminal Case–A Conversation with a Prosecuting Attorney*, 7 PRAC. LAW. (No. 7) 44, 53 (1961), quoted more fully in Petitioner's *Fowler* Brief, at p. 58 n.91. *See also id.* at 52, 56-61.



a lesser-offense verdict in any case prosecuted as a first degree murder charge, whereas only ten out of twelve jurors need concur to convict a defendant who is prosecuted for second degree murder or manslaughter, and only five out of six jurors need concur to convict a defendant prosecuted for negligent homicide.[65] In numerous cases prosecutors have chosen to avoid the unanimous-jury requirement for capital trials, either by amending the indictment, *see, e.g., State v. Ford*, 259 La. 1037, 254 So.2d 457, 459-460 (1971), by announcing a *nolle prosequi* of the capital charge in open court,[66] *see, e.g., State v. Doucet*, 177 La. 63,

[65]La. Code Crim. Proc. Ann., art. 782(A) (1975 supp.) provides that "[c]ases in which punishment may be capital shall be tried by a jury of twelve jurors, all of whom must concur to render a verdict. Cases in which the punishment is necessarily confinement at hard labor shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict. Cases in which the punishment may be confinement at hard labor shall be tried by a jury composed of six jurors, five of whom must concur to render a verdict." (Before January 1, 1975, "[c]ases in which the punishment is necessarily at hard labor [were required to] ... be tried by a jury composed of twelve jurors, nine of whom must concur to render a verdict." La. Code Crim. Proc. Ann., art. 782 (1967). *See Johnson v. Louisiana*, 406 U.S. 356 (1972).) The Supreme Court of Louisiana long ago recognized that "[i]t is true that, in a prosecution for murder, the defendant could not have been convicted, even of manslaughter, except by a unanimous verdict; whereas, in prosecution for manslaughter, he might have been convicted by a verdict concurred in by only 9 out of the 12 jurors." *State v. Vaughn*, 145 La. 31, 81 So. 745, 746 (1919). *See also State v. Ford*, 259 La. 1037, 254 So.2d 457, 459 (1971).

[66]La Code Crim. Proc. Ann., art. 691 (1975 supp.), explicitly empowers the district attorney to dismiss one or more counts of an indictment without dismissing the entire indictment.

147 So. 500, 501 (1933); *State v. Bourgeois*, 158 La. 713, 104 So. 627, 631-632 (1925); *State v. Vaughn*, 145 La. 31, 81 So. 745, 746 (1919); *State v. Evans*, 40 La. Ann. 216, 3 So. 838, 839 (1888), or simply by proceeding to trial on a manslaughter charge where the defendant has been indicted for murder, *State v. Fontenot*, 131 La. 60, 58 So. 1033 (1912); *State v. Vial*, 153 La. 883, 96 So. 796, 800 (1923). In *State v. Vaughn*, 145 La. 31, 81 So. 745, 746 (1919), the Supreme Court of Louisiana declared:

> "[i]t is well settled that the state may, at any time during a prosecution for a crime in the nature of which are included all the elements of a less serious offense, abandon the prosecution for the graver crime and proceed with the prosecution for the less serious one."

And in *State v. Fontenot*, 131 La. 60, 58 So. 1033 (1912), the Court said:

> "[t]he state had the right to abandon the charge of murder and to try the accused for manslaughter. Why should the accused complain of being relieved of all chance of conviction of the greater offense?"

*See also State v. Cooley*, 260 La. 768, 257 La. 768, 257 So.2d 400, 401-402 (1972).[67]

[67]In *State v. Evans*, 40 La. Ann. 216, 3 So. 838 (1888), the district attorney, at the beginning of trial, entered a *nolle prosequi* of a murder charge and proceeded to prosecute and convict the defendant of manslaughter on the same indictment. The Supreme Court of Louisiana affirmed, ruling that the State had a right "to strike out or abandon the words that charge the malice or felony, or other mere aggravation, which enlarges the crime, and to prosecute only for the inferior offense, which remains sufficiently charged in the indictment without such words of aggravation; and this is all that has to be done in the instant case. We can see nothing but benefit to the defendant which could result from such abandonment; for, since without it he could be lawfully convicted of the lesser offense, why should he complain of being relieved of all chance of conviction of the greater?" 3 So. at 839.



Thus, without any statutory guidance or judicial control, a district attorney is free to elect to charge first degree murder or some lesser, non-capital offense on the same set of facts. This discretion is absolute[68] and will inevitably result in an uncertain and inconsistent, if not discriminatory,[69] selection of

[68]In *State ex rel. Eames v. Amis*, 288 So.2d 316 (La. 1974), appellant had been indicted on two counts of murder and one count of inciting to riot and murder. (The district attorney subsequently *nolle presequied* this latter count and filed a two-count bill of information charging appellant with inciting and participating in a riot.) To protect appellant's constitutional right to a speedy trial, a closely divided Louisiana Supreme Court ordered appellant tried on the murder counts by a date certain, but it emphasized that "we do not attempt to dictate to the District Attorney the order of prosecution of multiple charges pending against an accused. Our determination reflects only our concern that defendant be afforded his constitutional right to a speedy trial on the grave charges of murder pending against him." 288 So.2d at 318.

[69]In *Pier 1 Imports, Inc. v. Pitcher*, 270 So.2d 228 (La. App. 1972), the district attorney prosecuted appellants three times for Sunday closing law violations–the only prosecutions for this offense even though the Sunday closing law was widely violated by others in the parish. A stipulation was offered at trial to show that hundreds of violations were known to the district attorney. Appellants' attempt to enjoin their prosecution was unsuccessful, and the Supreme Court of Louisiana denied review, *Pier 1 Imports, Inc. v. Pitcher*, 272 So.2d 696 (La. 1973), prompting Mr. Justice Barham to write in dissent that the arbitrary prosecutorial practice of the district attorney:

> "permits some, like [appellants] . . . in this case to be prosecuted for activities in which others engage with impunity. The delegation of the prosecutorial function in this matter denies equal protection and due process to these [appellants] . . ."

272 So.2d at 696.

defendants to be prosecuted on capital charges. Assuming ubiquitously "[w]ell-intentioned prosecutors,"[70] prosecutorial practices must nevertheless vary from parish to parish and incumbent to incumbent—the more so because, as demonstrated at pages 55-62 *infra*, the legal definitions which set the capital offense off from lesser offenses are amorphous and opaque, and their application to specific factual situations is largely conjectural. The inescapable result recalls the abhorrent adage with which Sir Walter Scott and others criticized the Scots jurisprudence of the Seventeenth Century: " 'Show me the man, and I will show you the law.' "[71]

2. *Plea Bargaining*

Although Article 557 of the Louisiana Code of Criminal Procedure prohibits the entry of a guilty plea to a capital charge,[72] Article 558 provides that:

> "[t]he defendant, with the consent of the district attorney, may plead guilty of a lesser offense that is included in the offense charged in the indictment."[73]

Article 487(B) allows a defendant to plead guilty to an even broader range of offenses in exchange for the

[70] *Baggett v. Bullitt*, 377 U.S. 360, 373 (1964).

[71] SCOTT, THE BRIDE OF LAMMERMOOR 29 (Everyman ed. 1932).

[72] La. Code Crim. Proc. Ann., art. 557 (1975 supp.) provides: "A court shall not receive an unqualified plea of guilty in a capital case. If a defendant makes such a plea, the court shall order a plea of not guilty entered for him."

[73] La. Code Crim. Proc. Ann., art. 558 (1967).



dismissal of an indictment: he may enter "a plea of guilty to a crime nonresponsive to the original indictment when such a plea is acceptable to the district attorney, and in such case, the district attorney shall not be required to file a new indictment to charge the crime to which the plea is offered."[74] In *State v. Green*, 269 So.2d 460 (La. 1972), the Louisiana Supreme Court construed articles 558 and 487(B) together to allow a guilty plea to a lesser offense which would not be submitted as a responsive verdict under Article 814 at a jury trial:

> "The limitation imposed by Article 814 on verdicts which may be rendered as responsive to stated charges is applicable to verdicts rendered upon the trial of a cause as distinguished from pleas of guilty knowingly and voluntarily entered by an accused. The limitations on verdicts which may be applicable to a trial are not entirely pertinent to a guilty plea. In the latter instance the accused actively and voluntarily participates in a determination of the plea to be entered.
>
> "Articles 487(B) and 558 of the Code of Criminal Procedure are in keeping with the established rationale that a guilty plea of a lesser offense is a responsive verdict. By its language Section 487(B) is broad and permissive.
>
> "Generally, no limitation is imposed on the guilty pleas which may be entered to a pending charge, except the requirement that the plea be to a lesser offense, and that the lesser included offense be of the same generic class, not requiring proof of any element not found in the major crime charged."

[74] La. Code Crim. Proc. Ann., art. 487(B) (1975 supp.).

(269 So.2d at 463.) Accordingly, in *State v. Cooley*, 260 La. 768, 257 So.2d 400, 402 (1972), the court observed that:

> "[t]oday, under our peculiar set of statutes, a person can plead guilty to the crime of attempted murder under an indictment for murder, provided such is agreeable to the district attorney (C.Cr.P. art. 487(B)), even though attempted murder is not a responsive verdict to murder under C.Cr.P. art. 814."

The Louisiana Supreme Court has forcefully endorsed the practice of plea bargaining and has recognized that a "defendant may validly have entered a guilty plea, guilty or not, because of other considerations." *State v. Riley*, 284 So.2d 557, 558 (La. 1973). "Plea bargains are to be encouraged and fostered. The administration of criminal justice would be seriously hampered without that means of disposing of the case load." *State ex rel. Jackson v. Henderson*, 283 So.2d 210, 211 (La. 1973); *see also State v. Torres*, 281 So.2d 451, 453 (La. 1973). And although a district attorney must secure the agreement of the trial court to a *sentencing* bargain,[75] he has unfettered power to charge-bargain – that is, to agree to accept a guilty plea to a lesser offense. In the case of a defendant indicted for first degree murder, the prosecutor may therefore accept a plea to second degree murder, attempted murder, manslaughter, negligent homicide, or an assault charge.[76] Or he may decline to accept these death-averting pleas, for any reason sufficient to himself or for no reason. On the appeal of a defendant convicted of a narcotics violation, the Louisiana Supreme Court ruled that the prosecutor was not obliged to have reduced the charge or to have offered the appellant immunity simply because codefendants had received such treatment: "[t]he matter of the prosecution of any criminal case is within the entire control of the district attorney, . . . and the fact that not every law violator has been prosecuted is of no concern of appellant." *State v. Jourdain*, 225 La. 1030, 74 So.2d 203, 204-205 (1954). The use of that sort of freedom on the part of district attorneys "to nullify

[75] "[A]greements made solely by a prosecuting attorney granting immunity from sentence or assurance concerning the extent of a sentence are unenforceable and do not bar subsequent action by the court. Such agreements gain vitality only when the judge becomes a party." *State v. Hingle*, 242 La. 844, 139 So.2d 205, 207 (1962) (on rehearing).



[76] The district attorney is free to accept a plea of guilty to an offense which would not be a "responsive verdict" at the trial of the case. For example, while a verdict of "guilty of attempted murder" is not responsive to a murder charge under La. Code Crim. Proc. Ann., art. 814(A) (1975 supp.), a district attorney could justify the propriety of accepting an attempted murder *plea* in a homicide case (assuming that he felt any need to justify it doctrinally), by reference to the Louisiana-law doctrine that a defendant is guilty of attempt even though the attempted crime is consummated. La. Rev. Stat. Ann. §14:27(c) (1974) provides:

> "An attempt is a separate but lesser grade of the intended crime; and any person may be convicted of an attempt to commit a crime, although it appears on the trial that the crime intended or attempted was actually perpetrated by such person in pursuance of such attempt."

"The common law rule that 'failure' is an essential element of an attempt and that a person cannot be convicted of an attempt if the crime was actually committed, has been rejected." Reporter's Comment, La. Rev. Stat. Ann. §14:27 (1974). *See also State v. Sercovich*, 246 La. 503, 165 So.2d 301, 303 (1964).

harsh, 'unrealistic' penalties that legislators have prescribed"[77] is notorious; and its implications for an uncontrollably arbitrary administration of the harshest penalty known to humankind are rehearsed in Petitioner's *Fowler* Brief, at pp. 54-61. At the very least, in the absence of any standards or procedures which might conceivably regularize the practices of district attorneys in accepting or declining to accept guilty pleas to noncapital charges, some defendants indicted for first degree murder will escape with sentences less harsh than death while others are eventually consigned to die for indistinguishable offenses upon unaccountable grounds.

### 3. *Jury Discretion*

In every case in which a trial judge instructs the jury on the capital crime of first degree murder, " 'it is the mandatory duty of the trial judge, whether so requested or not, to charge the jury that they may return a verdict for the lesser crime[s] . . .' "[78] of second degree murder and manslaughter which are designated as "responsive verdicts" in a first degree murder prosecution by Article 814 of the Louisiana Code of Criminal

[77] Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 54 (1966).

[78] *State v. Cooley*, 260 La. 768, 257 So.2d 400, 401 (1972). The Louisiana Supreme Court has held that the trial judge's failure to instruct on a responsive verdict is not waived by a defendant's failure to request such an instruction. *State v. Thomas*, 50 La. Ann. 148, 23 So. 250, 252 (1897); *State v. Jones*, 46 La. Ann. 1395, 16 So. 369, 370 (1894); *see also State v. Braxton*, 197 La. 733, 103 So. 24, 27 (1924) (on rehearing) (dictum); *State v. Wright*, 104 La. 44, 28 So. 909, 910 (1900) (dictum).



Procedure, page 29 *supra*.[79] *See State v. Broussard*, 217 La. 90, 46 So.2d 48 (1950);[80] *State v. Vial*, 153 La. 883, 96 So. 796, 800 (1923). "Failure to . . . [instruct on all responsive verdicts] constitutes reversible error." *State v. Brown*, 214 La. 18, 36 So.2d 624, 627 (1948). *See State v. Birbiglia*, 149 La. 4, 41-42, 88 So. 533, 546 (1920). The rule is long settled that "[i]t matters

[79] Article 814, specifying the permissible responsive verdicts to each charge, was enacted to:

> "remov[e] the uncertainty theretofore involved in determining those offenses of less magnitude which were included within the offense charged. By setting out the permissible responsive verdicts, the article greatly simplified the preparation and scope of the charge. At the same time the result was that the accused could more definitely determine in advance the verdicts which could result from any given charge."

*State v. Green*, 263 La. 837, 269 So.2d 460, 463 (1972). Article 814 is therefore applied routinely and mechanically in all cases.

La. Code Crim. Proc. Ann., art. 809 (1967), provides that "[a]fter charging the jury, the judge shall give the jury a written list of the verdicts responsive to each offense charged, with each separately stated. The list shall be taken into the jury room for use by the jury during its deliberation." That procedure was followed in petitioner's case.

[80] "The other contention of counsel is that the verdict is illegal, or rather unconstitutional, because attempted simple rape is not responsive to the charge of attempted aggravated rape.

> "The short answer to this proposition is that the verdict is responsive for the reason that it is specifically declared to be by Article 386 of the Code of Criminal Procedure, as amended and reenacted by Act. No. 161 of 1948, under which the judge was required, on a charge of attempted aggravated rape, to instruct the jury that it had the right to find appellant guilty of an attempt to commit simple rape. *State v. Stanford*, 204 La. 439, 15 So.2d 817."

*State v. Broussard*, *supra*, 46 So.2d at 52.

not . . . what is the nature of the evidence or the line of defense adopted by the defendant. The law, absolutely and without qualifications, gives the jury the right to return a verdict of manslaughter on a trial for murder." *State v. Clark*, 46 La. Ann. 704, 15 So. 83 (1894).[81]

> "In numerous other jurisdictions, the matter of responsive verdicts involves the exercise of discretion on the part of the trial court; a court is found to have abused its discretion to charge a responsive verdict only when the reviewing court finds that such a declined charge was warranted by the evidence adduced upon trial. In Louisiana, we do not look to the evidence adduced upon trial to see if responsive verdicts set forth in C. Cr. Proc. Art. 814 are warranted. In a prosecution for an offense not named in C. Cr. Proc. Art. 814, our only inquiry regarding a responsive verdict charged and returned by the jury would be whether the verdict returned was a 'lesser and included grade' of the offense charged. C. Cr. Proc. Art. 815. An examination of the evidence is not undertaken as is done in many jurisdictions where the charging of responsive verdicts is within the sound discretion of the trial court, based upon the evidence adduced at trial.
>
> It is demonstrated, therefore, that a verdict of manslaughter may readily be seen as responsive to a charge of murder, and without resort to review of the evidence as is done by some other jurisdictions."

*State v. Peterson*, 290 So.2d 307, 311 (La. 1974). *See also State v. Cook*, 117 La. 114, 41 So. 434 (1906) (jury must be charged on manslaughter in a poisoning case).

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[81] *See also State v. Brown*, 40 La. Ann. 724, 4 So. 897, 898 (1888): "The question is not one of a proper charge under the test of the evidence of the trial, but one of compliance with an absolute mandate of the law."



Mr. Justice Barham has powerfully stated the Eighth Amendment implications of this procedure in his dissenting opinions in *State v. Hill*, 297 So.2d 660 (La.) *cert. denied*, 419 U.S. 1090 (1974), and *State v. Selman*, 300 So.2d 467 La. (1974), which he incorporated by reference in his dissent below, *State v. Roberts*, 319 So.2d 317, 323 La. (1975). In *Hill*, he wrote:

> "[u]nder our present statutory scheme the jury, by virtue of its right to return responsive verdicts, continues to be vested with unfettered discretion to impose or refrain from imposing the death penalty after trial of a capital offense. When such discretion exists, and its exercise results in the imposition of the death penalty in some cases but not in others, it is of no moment that the jury does not actually impose the penalty, but only determines whether the defendant is guilty of the capital crime charged or some lesser offense. Opportunity for discriminatory imposition of the death penalty still exists. The Legislature has not avoided the 'unequal application' of the death penalty as Furman requires."

297 So.2d at 662-663. And in *Selman*, dissenting from the Louisiana Supreme Court's affirmance of a death sentence for aggravated rape, he explained:

> "[i]t is readily apparent that Louisiana does not have a 'mandatory death penalty,' for a defendant charged with aggravated rape. The jury has a sliding scale for application of the penalty by returning a particular responsive verdict. The fact that the jury qualifies the verdict by classifying it as another offense makes no less real the total control left in the jury for deciding, upon any basis it chooses, whether one who has committed the crime of aggravated rape shall or shall not be sentenced to death. It is a common practice in this

> State, and I am sure throughout the nation, for juries to offer 'mercy' under certain charges by returning a verdict of 'guilty' to a lesser but included offense which is legally responsive to the charge for which the defendant was tried. I can make no distinction between qualification of a single verdict which permits discretion as to death or imprisonment and a responsive verdict scheme which may be used to discretionarily accomplish discriminatory application of the death penalty."

300 So.2d at 476.

A majority of the Louisiana Supreme Court has drawn precisely this distinction. Conceding the unconstitutionality of a statute which left "to the uncontrolled discretion of the jury the determination whether the defendant committing a particular crime should die or be imprisoned," *id.* at 473, the majority has distinguished Louisiana's responsive verdict scheme on the ground that thereunder "[t]he sole determining factor as to which penalty will be imposed depends upon the particular crime for which the jury finds the accused guilty...." *Ibid.* But the reqirement that the jury find a defendant guilty of a lesser crime in order to spare his life does not constrain the jury's dispensing power in the slightest measure, since (1) the lesser offenses must be charged in *every* case regardless of the evidence, (2) the elements which distinguish the greater and lesser offenses are amorphously defined, and (3) a conviction of a lesser offense which is wholly irrational in terms of the evidence submitted at trial will not be reversed on appeal.

*First*, as we have already seen at pages 50-52, *supra*, "the trial judge must instruct the jury as to *all* responsive verdicts regardless of the evidence adduced at trial."[82]

[82]Bennett, *Criminal Law and Procedure*, 20 LA. L. REV. 326, 327 (1960) (emphasis in original).



*Second*, the distinctions between first degree murder, second degree murder, and manslaughter are extremely unclear. The jury is not merely permitted but is rather unavoidably required to exercise raw sentencing discretion through the forms of determining the crime of which the defendant is guilty.

In petitioner's case, under La. Rev. Stat. Ann. §14:30, first degree murder was theoretically distinguished from second degree murder by the presence of "a specific intent to kill or to inflict great bodily harm."[83] La. Rev. Stat. Ann. §14:10 (1974) provides:

> "Criminal intent may be specific or general:
>
> "(1) Specific criminal intent is that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow this act or failure to act.
>
> "(2) General criminal intent is present whenever there is specific intent, and also when the circumstances indicate that the offender, in the ordinary course of human experience, must have adverted to the prescribed criminal consequences as reasonably certain to result from his act or failure to act."

Specific criminal intent may be inferred from the same circumstances of the crime that will support a finding of general criminal intent:

[83]The State's theory was that the killing of Mr. Lowe occurred during "the perpetration or attempted perpetration of an armed robbery." *See* pages 7-17 *supra*. Under the controlling 1973 statutes, a felony-murder of this sort will be either second degree, La. Rev. Stat. Ann. §14:30.1(2), p. 3-4 *supra*, or first degree, La. Rev. Stat. Ann. §14:30(1), p. 3 *supra*, depending upon the absence or the presence of the intent described in the text.

"[i]n short, specific intent is present when from the circumstances the offender must have subjectively desired the prohibited result; whereas general intent exists when from the circumstances the prohibited result may reasonably be expected to follow from the offender's voluntary act, irrespective of any subjective desire to have accomplished such result.

" 'Where a specific intent is an element of a crime, the specific intent must be proved as an independent fact and cannot be presumed from the commission of the unlawful act.' . . .

" 'The intent with which a harmful act is done is usually not expressed in words, and the jury is permitted to draw such inferences of intent as are warranted under all the circumstances of the particular case. . . .' "

*State v. Daniels,* 236 La. 998, 109 So.2d 896, 899-900 (1959).[84]

The jury's broad power to find "specific intent" in a felony-murder case is guaranteed by the doctrine that the requisite intent may be inferred from a killing with a deadly weapon. In *State v. Square,* 257 La. 743, 244 So.2d 200, 235 (1971), *sentence rev'd sub nom. Square v. Louisiana,* 408 U.S. 938 (1972), where the victim had been stabbed to death, the Louisiana Supreme Court declared:

[84]*See also* La. Rev. Stat. Ann. §15:445 (1967):

"In order to show intent, evidence is admissible of similar acts independent of the act charged as a crime in the indictment, for though intent is a question of fact, it need not be proven as a fact, it may be inferred from the circumstances of the transaction."



"As to the contention that there was no evidence of specific intent, we refer to the pertinent part of Article 10 of the Criminal Code which defines specific criminal intent as 'that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act.' Obviously if the circumstances established that Square stabbed the victim a number of times, which we find the evidence supports, Square must have actively desired her death."[85]

The "specific intent required in the crime of murder in Louisiana is to kill or to commit great bodily harm. No evidence of those facts is essential in this prosecution [where the victim died of a gunshot wound], for there is a presumption that one intends the consequences of his act . . . If one shoots another, he is presumed to [intend to] kill or maim." *State v. Jordan,* 276 So.2d 277, 279 (La. 1973). *See also State v. Lee,* 275 So.2d 757 (La. 1973); *State v. Pettle,* 286 So.2d 625 (La. 1973). Thus, "specific intent" may be inferred from

[85]*See also State v. Garner,* 241 La. 275, 128 So.2d 655, 660 (1961) (where defendant was convicted of attempted manslaughter):

"If charging a person in a threatening manner and trying to get at him with a knife over a bar is not motivated by a specific criminal intent we fail to envision a set of facts which could more clearly evince such intent.

"The action of Garner was aggressive and forceful and the would-be assailant had in his possession and within his control the weapon required to accomplish the killing, all of which speaks in clear and unmistakable tones of his specific intent. Though subjective and itself unseen and unheard, the requisite intent is manifested by the actions of the accused here."

*any* killing with a deadly weapon.[86] Or it may not be so inferred. The determination which the jury is called upon to make is whether the circumstances were such

[86]This rule essentially vitiates the requirement in the 1973 statute that "specific intent" to kill or maim be proved before a felony-murder is elevated to first degree. Prior to enactment of the 1973 statute, the crime of "murder" was defined as "the killing of a human being (1) when the offender has a specific intent to kill or to inflict great bodily harm; or (2) when the offender is engaged in the perpetration or attempted perpetration of [enumerated felonies] . . . even when he has no intent to kill." *State v. Frezal*, 278 So.2d 64, 71 (La. 1973). The rule was that "under the felony-murder doctrine, it [is] . . . not necessary to prove intent as to homicide." *State v. Evans*, 249 La. 861, 192 So.2d 103, 106, 106 (1966). "[S]pecific intent is not an element of the crime" in a felony-murder case. *State v. Square*, *supra*, 244 So.2d at 235. *Accord: State v. Frezal*, *supra*, 278 So.2d at 71. The Legislature obviously intended to add an additional element ("specific intent to kill or to inflict great bodily harm") when it created first degree felony-murder (La. Rev. Stat. Ann. §14:30(1), p. 3 *supra*). In *State v. Wilson*, 315 So.2d 646, 649-650 (La. 1975), the Louisiana Supreme Court affirmed a death penalty imposed under the new statute where the victim had been shot to death during either an armed robbery or an aggravated burglary, and it approved the following instruction:

> "I'm going to paraphrase, if you think he was committing an armed robbery and had the specific intent to kill this lady or harm her in anyway, great bodily harm, then he is guilty of first degree murder. 'If you find the defendant was engaged in the perpetration or attemped [sic] perpetration of aggravated burglary of the residence of Agnes Hutchinson even though the defendant had no specific intent to kill, you shall find the defendant guilty of Second Degree Murder. If you find the defendant was not engaged in the perpetration of armed robber [sic] of Agnes Hutchinson or was not engaged in the perpetration or attempted perpetration of aggravated burglary of the residence of Agnes Hutchinson, but had the specific intent to kill or inflict great bodily harm upon Agnes Hutchinson, I charge you to find the defendant guilty of Second Degree Murder.' To paraphrase again the State is saying two things. If you find that he had the intent to arm [sic] rob her and kill her, it's first degree murder. If he had the intent to

*(continued)*



that the defendant "must" have intended to kill or maim, or whether they were only such that a killing or maiming "might reasonably be expected to follow" what the defendant did. *State v. Daniels*, *supra*. But since the jury's basis for inferring what the defendant must have intended is the likelihood of his acts to produce the relevant consequences in common experience, *State v. Jordan*, *supra*, the line between "specific intent" and "general intent" is paper-thin when those concepts come to be applied in particular cases.

In every first degree murder case, the jury is also instructed that it may find the defendant guilty of manslaughter if it determines that the killing is:

> "[a] homicide which would be murder under either Article 30 (first degree murder) or Article 30.1 (second degree murder), but the offense is committed in sudden passion or heat of blood immediately caused by provocation sufficient to deprive an average person of his self control and cool reflection. Provocation shall not reduce a homicide to manslaughter if the jury finds that the offender's blood had actually cooled, or that an average person's blood would have cooled, at the time the offense was committed."

*(footnote continued from preceding page)*

> commit aggravated burglary even though he didn't have the intent to kill, it is second degree. If he had neither the intent to commit robbery or burglary but had the intent to kill or inflict great bodily harm, it is second degree murder.' "

But since a jury may infer "specific intent to kill or to inflict great bodily harm" from the very fact of the shooting, no additional burden of proof has been placed upon the State in the usual felony-murder situation.

La. Rev. Stat. Ann. §14:31(1) (1974).[87] The Louisiana Supreme Court has not explicated this definition, declaring that the statutory provision " 'makes clearly manifest the offense intended to be defined.' " *State v. Coleman*, 260 La. 897, 257 So.2d 652, 653 (1972) (quoting *State v. Nichols*, 216 La. 662, 44 So.2d 318, 319 (1950)).[88]

> " '[T]he provocation sufficient to reduce an intentional killing from murder to that of manslaughter must arise at the time of the commission of the offense, or before the passion of the slayer had time to cool. The provocation by deceased must be the direct and controlling cause of the passion, and it must be such as naturally and instantly to produce in the minds of persons

[87]La. Rev. Stat. Ann. §14:31(2) further defines manslaughter as:

> "A homicide committed, without any intent to cause death or great bodily harm.
>
> (a) When the offender is engaged in the perpetration or attempted perpetration of any felony not enumerated in Articles 30 or 30.1, or of any intentional misdemeanor directly affecting the person; or
>
> (b) When the offender is resisting lawful arrest by means, or in a manner, not inherently dangerous, and the circumstances are such that the killing would not be murder under Articles 30 or 30.1"

[88]*State v. Nichols, supra*, 44 So.2d at 319:

> "[Appellant alleges] that '* * * Article 31 of the Criminal Code, covering the crime of manslaughter * * * is unconstitutional in that the crime intended to be denounced thereby is inadequately and improperly defined.' To our mind, Article 31 of the Criminal Code, defining the crime of manslaughter, makes clearly manifest the offense intended to be defined."



> ordinarily constituted the highest degree of exasperation, rage, sudden resentment, or terror, rendering the mind incapable of cool reflection.'
>
> ". . . A provocation which would not naturally cause instant resentment, but which would have to be thought or brooded over after its commission, in order to produce rage or anger, was declared by it not to be a provocation such as the law contemplated as one sufficient to reduce an intentional killing from murder to manslaughter."

*State v. Walker*, 50 La. Ann. 420, 23 So. 967, 968 (1898). The question whether a homicide should be designated as manslaughter is left essentially to the discretion of the jury:

> "It has generally been held that the provocation should be such as would stir the passion and resentment of 'a reasonable person, one of ordinary self control.' . . . This 'average person' test is adopted in this section.
>
> . . .
>
> "In common with a majority of the statutes in other states, the proposed manslaughter section has defined the offense without a detailed enumeration of what shall or shall not be considered adequate provocation. It is a matter dependent upon so many and varying circumstances that a stereotyped classification would be impracticable. The adequacy of provocation will be primarily a jury question.
>
> . . .
>
> "The former Louisiana rule was that words alone are not a sufficient provocation [State v. Conerly, 48 La. Ann. 1561, 21 So. 192 (1896)]; but under this section it is the opinion of the Reporter and the Advisers that whether or not words are a sufficient provocation should be a question of fact for the jury in each individual case.

> "It is sufficient if the jury find either (1) that the offender's blood had actually cooled, or (2) that the average man's blood would have cooled. . . . The question of reasonable time for cooling will be a jury question, to be determined by the nature and circumstances of the provocation, as well as by the length of time intervening."

Reporter's Comment, La. Rev. Stat. Ann. §14:31 (1974). The jury's unchecked freedom to manipulate the amorphous elements of the crime of manslaughter is self-evident. *See, e.g., State v. Simpson,* 216 La. 212, 43 So.2d 585 (1950); *State v. Mayfield,* 186 La. 318, 172 So. 171 (1937); *State v. Cooper,* 112 La. 281, 36 So. 350 (1904); *State v. Senegal,* 107 La. 452, 31 So. 867 (1902).

*Third,* no controls are imposed against the return of irrational or factually impossible lesser-offense verdicts. To the contrary, verdicts finding a defendant guilty of a lesser included offense which is unsupported by any evidence are uniformly upheld on appeal. These results destroy the predicate on which the Louisiana Supreme Court has sustained Louisiana's responsive verdict scheme under *Furman:* namely, that:

> "[t]he use of these lesser verdicts . . . is contingent upon the jury finding *insufficient evidence to convict the defendant of first degree murder,* with which he is charged."

*State v. Hill,* 297 So.2d 660, 662 (La. 1974) (emphasis added). This sanguine prediction (it can be no more than that in the absence of effective procedures to implement it) proves entirely baseless in the face of the realities of Louisiana precedent and practice.

In *State v. Vial,* 153 La. 883, 96 So. 796, 800 (1923), the Supreme Court of Louisiana recognized that "[u]nder our peculiar jurisprudence . . . on trials for



murder, the jury may find the prisoner guilty of manslaughter, although the evidence may show him to be guilty of murder. . . ." In *State v. Cooley,* 260 La. 768, 257 So.2d 400, 401 (1972), a defendant convicted of manslaughter at the close of his murder prosecution argued that:

> "the verdict returned by the jury finding . . . [him] guilty of manslaughter on an indictment for murder was a compromise, pure and simple, there not being one scintilla of evidence to show that the defendant was guilty of manslaughter. That is, he contends that the record in the case is devoid of any evidence tending to show that the deceased did anything to the defendant that would have produced sudden passion or heat of blood immediately caused by provocation sufficient to deprive an average person of self control and cool reflection.
>
> "There is no merit to this bill. . . .
>
> "Our legislature has seen fit to make the crime of manslaughter responsive to the charge of murder. C. Cr. P. art. 814. It has historically been so. . . .
>
> " '[o]n *all* trials for murder the jury may find the prisoner guilty of manslaughter.' "

(Emphasis added.) The Court reviewed a similar claim in *State v. Peterson,* 290 So.2d 307 La. (1974) and reached an identical result:

> "responsiveness of a verdict of manslaughter in a murder prosecution is expressly provided by the legislature under Code of Criminal Procedure Article 814. This, defendant readily concedes. She argues, nevertheless, that manslaughter is not a legally or constitutionally responsive verdict, especially in a case where there is no evidence to support such a verdict (that is, no evidence of the 'passion' element).

> "Defendant cites cases in which this Court has declared verdicts returned in criminal trials unresponsive to the charge being tried because essential elements of the lesser crime found by verdict were not essential elements of the greater crime charged. . . . However, we note that in these cases the erroneous responsive verdicts were not provided for in statutory enactments by the legislature. . . . In Louisiana, when there is evidence to prove the greater offense, it is the jury's province to determine the existence *vel non* of lesser culpability and exercise the statutory right to return the manslaughter verdict. See State v. Cooley, 260 La. 768, 257 So.2d 400 (1972). This Court will not look to the evidence to make such a determination."

290 So.2d at 309-310, 310. *See also State v. Cook*, 117 La. 114, 41 So. 434-435 (1906); *State v. Brown*, 40 La. Ann. 727, 4 So. 897, 897-898 (1888); *State v. Clark*, 46 La. Ann. 704, 15 So. 83 (1894); *State v. Thomas* 50 La. Ann. 148, 23 So. 250, 252 (1897); *State v. Wright*, 104 La. 44, 28 So. 909, 910 (1900).[89]

The Supreme Court of Louisiana has conceded that juries *do* act capriciously in the exercise of this unfettered power to choose among alternative responsive verdicts; but it has declared itself powerless to check their caprice:

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[89]This phenomenon is not limited to homicide cases. A jury may also convict of simple rape despite the fact that the evidence unquestionably shows capital aggravated rape. *See, e.g., State v. Miller*, 237 La. 266, 111 So.2d 108 (1959). *Cf. also State v. Washington*, 272 So.2d 355 (La. 1973); *State v. Bolden*, 257 La. 60, 241 So.2d 490 (1970); *State v. Smith*, 259 La. 515, 250 So.2d 724 (1971); *State v. Ferrand*, 210 La. 394, 27 So.2d 184 (1946).



> "[t]he law's command is that the jury must be informed by the Court that, on trials for murder, the jury may find the prisoner guilty of manslaughter, and the omission or the refusal to so inform them is a flagrant disobedience of the law, and is a fatal error. In such cases the jury are the sole judges of the state of facts disclosed on the trial, which may justify them to return a verdict of manslaughter, and the court is powerless to avoid their verdict, because in its opinion the evidence called for the finding of the higher offense. The verdict under the law would be responsive to the indictment, and it should stand although it might be illogical, unjust, or unjustifiable, under the evidence. Examples are not wanting of cases in which the jury have condemned some of the conspirators in a murder case for the highest offense charged, and the other conspirators for manslaughter only."

*State v. Brown*, 40 La. Ann. 725, 4 So. 897, 897-898 (1888).

Thus, a Louisiana jury's power to exact or to remit the death penalty in a "capital" crime case remains as ungoverned and as ungovernable as it was before *Furman*. "[W]ithout accounting to anyone,"[90] the jury may still spare the defendant or kill him as it pleases.

4. *Executive Clemency*

Article 4, section 5(E)(1), of the Louisiana Constitution of 1974 empowers the Governor to:

> "grant reprieves to persons convicted of offenses against the state and, upon recommendation of the

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[90]*State v. Selman, supra*, 300 So.2d at 476 (dissenting opinion of Mr. Justice Barham).

> Board of Pardons, [to] . . . commute sentences, pardon those convicted of offenses against the state, and remit fines and forfeitures imposed for such offenses."

Article 4, section 5(E) (2) provides that the Board of Pardons shall consist of five electors, appointed by the Governor and subject to confirmation by the Senate, whose terms are concurrent with that of the appointing Governor. In 1975, implementing legislation was enacted. Act 593 of the Thirty-Eighth Regular Session provides:

> "[t]he governor may grant reprieves to persons convicted of offenses against the state and, upon recommendation of the Board of Pardons as hereinafter provided for by this Part, may commute sentences, pardon those convicted of offenses against the state, and remit fines and forfeitures imposed for such offenses."[91]

Procedural requirements for the consideration of *pardons* are then imposed,[92] but the power of the

[91]Act 593 (38th reg. sess.), West's La. Sess. L. Serv. 1975, at 935-937. This provision will be codified as La. Rev. Stat. Ann. §15:572.

[92]Act 593 enacts a new La. Rev. Stat. §15:572.4, as follows:

> "[e]very application for a pardon received by the board shall be registered chronologically, considered by it at least once and, if a recommendation for pardon is denied, reasons for the denial shall be affixed to the application. Thereafter the application, together with any additional supporting evidence thereafter presented, shall be reviewed at least once again. Each application for pardon which is approved by the board shall be forwarded to the governor.
>
> "Before considering the application for pardon of any person, the board shall give written notice to the district attorney of the parish in which the applicant was convicted, to the applicant, and any other interested persons of the date and time at which the application will be heard and considered. The district attorney and any other persons who desire to do so shall be given a

*(continued)*



Governor and the Board of Pardons[93] to commute death sentences is left completely uncontrolled.[94] *See also* Act 17 (38th reg. sess.), West's La. Sess. L. Serv. 1975, at 22-23.

The discretion of the Governor and the Board of Pardons to spare the lives of condemned felons is therefore absolute. In *Gaillard v. Cronvich*, 263 La. 750, 269 So.2d 231, 232 (1972), a case decided under the Constitution of 1921, the Louisiana Supreme Court declared:

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*(footnote continued from preceding page)*

> reasonable opportunity to attend the meeting and be heard."

It also enacts a new La. Rev. Stat §15:57a-5, which provides:

> "[u]pon request of the Board of Pardons, the Department of Corrections and the Department of Public Safety shall provide the Board of Pardons with such records of the fact and circumstances of the offense for which the person applying for a pardon was convicted, the offender's past criminal record, his social history, the prison record, and the physical, mental, or psychiatric condition of the person applying for a pardon, and any other records or other reports that may be requested."

[93]The concurrence of three members of the Board will support a recommendation of commutation. Act 593 enacts a new La. Rev. Stat. §15:572.1(E) which provides:

> "[a] majority of the total membership of the board shall constitute a quorum for the transaction of business, and all actions of the board shall require the favorable vote of at least a majority of the total membership."

[94]The power to pardon and the power to commute are related, but they are not identical: "[t]he power to commute sentences has been held to be incidental and akin to the power to pardon." *State v. Varice*, 292 So.2d 703, 777 (La. 1974).

> "[t]he only limitation of the Governor's commutation power [under the 1921 Constitution] is that he act pursuant to a written recommendation of commutation signed by [designated officials]. . . . Once this recommendation is received, the Governor has unlimited discretionary power to commute an applicant's sentence."

*See also State v. Melerine*, 238 La. 847, 116 So.2d 689 (1959); *State v. Trist*, 238 La. 853, 116 So.2d 691, 697 (1950). This "unlimited discretionary power" of the executive branch to commute sentences has been vigilantly preserved by the court. In 1972, the Louisiana Legislature enacted Act 502, which amended Article 817 of the Code of Criminal Procedure so as to allow a capital jury to qualify its verdict of guilty with the proviso "guilty . . .' [w]ithout capitol punishment or benefit of parole, probation, commutation or suspension of sentence' "[95] Relying on *Gaillard v. Cronvich*, *supra*, the Louisiana Supreme Court invalidated the restriction on commutation (although it held the other restrictions constitutional) because Article 817 so amended "permits a verdict denying the convicted defendant the right to commutation of sentence, whereas the constitution [of 1921] empowers the Governor to commute sentences in all cases not involving impeachment or treason." *State v. Ramsey*, 292 So.2d 708, 709 (La. 1974). *Accord: State v. Varice*, 292 So.2d 703, 707 (La. 1974); *State v. Lane*, 292 So.2d 711, 716 n.1 (La. 1974).

Once again we respectfully refer the Court to Petitioner's *Fowler* Brief for a more comprehensive discussion of the processes and institutions–here, executive clemency-whose specific Louisiana-law aspects only are described in this present brief.[96] Under

[95]Louisiana Acts 1972, No. 502, §1.

[96]*See* Petitioner's *Fowler* Brief, at pp. 95-100.



Louisiana law as elsewhere, executive clemency remains mysterious as life itself: awesome when it comes, awful when it does not, inscrutable in either case. All that can be said with certainty about it is that Louisiana's Governor and Board of Pardons are bound by no constraints and no logic when they consider and finally decree who within the class of the condemned will live and who will die. Criteria for reviewing clemency applications may vary wildly as officeholders are replaced–or there may be no criteria at all–although life and death hang in the balance.

* * *

This analysis of Louisiana's post-1973 capital punishment procedures demonstrates that the arbitrary selectivity condemned in *Furman* has been thoroughly preserved notwithstanding the formal statutory amendments of that year. Discretionary opportunities for imposition or avoidance of the death penalty are altogether as numerous and unregulated as before. A formally "mandatory" sentencing provision simply papers over this discretion and increases the likelihood of its arbitrary and discriminatory exercise by making it more diffuse and invisible.[97] Perhaps it is an accident–but we submit it is an unlikely accident–that twenty-eight of the thirty-three persons who have been sentenced to death under Louisiana's "mandatory" death penalty system are black. *See* Appendix A, *infra*. "The evidence of racial discrimination in capital punishment in twentieth century America is . . . hardly contestable." BOWERS, EXECUTIONS IN AMERICA 177 (1974). *See also* Brief for Petitioner in *Jurek v. Texas*, No. 75-5394, at Part III. This bleak chapter,

[97]*See* note 57 *supra* and accompanying text.

which includes the country's experience with purportedly mandatory death penalty schemes as well as those struck down in *Furman*,[98] now proves prophetic for Louisiana's "new" mandatory system.

One of the high historical offices of the Anglo-American prohibition against cruel and unusual punishments is to ward against those arbitrary inflictions of harsh criminal penalties that can fall so readily upon political, racial, or religious minorities. *See* Petitioner's *Fowler* Brief, at pp. 26-45. As a Member of Commons declared during the parliamentary debates on the punishment of Titus Oates: " 'We demand that punishments shall be regulated by law, and not by the arbitrary discretion of any tribunal.' "[99] The Eighth Amendment makes precisely the same demand, in order "that government by the people, instituted by the Constitution, . . . not imitate the conduct of arbitrary monarchs." *Weems v. United States*, 217 U.S. 349, 376 (1910). And Louisiana's administration of capital punishment that has sentenced petitioner to die grossly fails to meet this constitutional demand.

## THE EXCESSIVE CRUELTY OF DEATH

### III.

The submissions made in Part III of Petitioner's *Fowler* Brief, at pp. 102-140, and in Part III of the Brief for Petitioner, *Jurek v. Texas*, No. 75-5394, are fully applicable to death sentences inflicted under Louisiana law. Petitioner respectfully urges their consideration by the Court.

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[98] *See* Petitioner's *Fowler* Brief, at p. 137 n.226.

[99] 3 MACAULAY, THE HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES II 310 (1850).



## CONCLUSION

The penalty of death imposed upon petitioner Stanislaus Roberts is a cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. The judgment of the Supreme Court of Louisiana should therefore be reversed insofar as it affirms his death sentence.

Respectfully submitted,

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## APPENDIX A

The following persons have been sentenced to death under the 1973 capital punishment legislation; the race of each defendant appears in parentheses. The list is primarily based upon the records of the Louisiana State Penitentiary at Angola, Louisiana, and may not be absolutely comprehensive because not every condemned defendant is immediately sent there after sentencing.

1. *Cordell Lee* (black) (aggravated rape), Orleans Parish No. 248-551, (sentenced to death Aug. 19, 1975)
2. *James Hawthorn* (black) aggravated rape), Orleans Parish No. 248-812, (sentenced to death Aug. 15, 1975)
3. *Walter Reed* (black) (first degree murder), Jefferson Parish No. 75-351, (sentenced to death Aug. 14, 1975)
4. *Roger Yates* (white) (first degree murder), Orleans Parish No. 248-553, (sentenced to death Aug. 8, 1975)
5. *Ronald Smith* (black) (first degree murder), Orleans Parish No. 240-858, (sentenced to death July 28, 1975)
6. *Hillery Preston* (black) (aggravated rape), Orleans Parish No. 248-088, (sentenced to death July 28, 1975)
7. *Michael Williams* (black) (first degree murder), Jefferson Parish No. 75-378, (sentenced to death July 3, 1975)
8. *Rodney Blackwell* (white) (first degree murder), Jefferson Parish No. 75-249, (sentenced to death June 26, 1975)

9. *Shedrick Noble* (black) (aggravated rape), Orleans Parish No. 242-872, (sentenced to death June 6, 1975)

10. *Samuel Corey* (white) (first degree murder), Orleans Parish No. 245-715, (sentenced to death June 2, 1975)

11. *Eugene Stripling* (black) (aggravated rape), Orleans Parish No. 248-086, (sentenced to death May 30, 1975)

12. *Andrew Johnson* (black) (aggravated rape), Orleans Parish No. 247-011A, (sentenced to death May 3, 1975)

13. *Rodney Hamilton* (black) (first degree murder), Jefferson Parish No. 75-351, (sentenced to death April 22, 1975)

14. *Arthur Jones* (black) (aggravated rape), Orleans Parish No. 244-392, (sentenced to death March 31, 1975)

15. *Johnny Ross* (black) (aggravated rape), Orleans Parish No. 244-391, (sentenced to death March 21, 1975)

16. *Johnny C. Brooks* (black) (first degree murder), Terrebone Parish No. 54-683, (sentenced to death March 7, 1975)

17. *Edward Smith* (black) (first degree murder), Richland Parish No. 24158, (sentenced to death January 23, 1975); *conviction affirmed*, 322 So.2d 197 (La. 1975)

18. *Ezekial Jenkins* (black) (first degree murder) Webster Parish No. 44195, (sentenced to death December 4, 1974)



19. *William Paschal* (black) (first degree murder), Webster Parish No. 44195, (sentenced to death Dec. 4, 1974)

20. *David Waters* (black) (first degree murder), Webster Parish No. 44195, (sentenced to death December 4, 1974)

21. *Larry Calloway* (black) (first degree murder), Orleans Parish No. 244-393D, (sentenced to death November 14, 1974)

22. *Billy Monroe* (black) (aggravated rape), Orleans Parish No. 243-325, (sentenced to death October 22, 1974)

23. *Joseph Gleason* (black) (aggravated rape), Orleans Parish No. 239-513, (sentenced to death October 18, 1974)

24. *Stanislaus Roberts* (black) (first degree murder), Calcasieu Parish No. 4479-4, (sentenced to death September 30, 1974); *conviction affirmed*, 319 So.2d 317 (La. 1974); *certiorari granted*, June 22, 1976, (No. 75-5844)

25. *Harry Roberts* (black) (first degree murder), Orleans Parish No. 241-775C, (sentenced to death September 18, 1974)

26. *Robert Leonard* (black) (aggravated rape), Orleans Parish No. 242-651G, (sentenced to death July 18, 1974)

27. *Lawrence Watts* (black) (aggravated rape), St. Mary's Parish No. 70-132, (sentenced to death July 15, 1974); *conviction affirmed*, 320 So.2d 146 (La. 1974), *pending on petition for certiorari*, No. 75-6067

28. *Charles Bryant* (white) (aggravated rape), Ouachita Parish No. 36-038, (sentenced to death June 27, 1974)

29. *Herbert Nicholson* (black) (aggravated rape), Orleans Parish No. 238-379, (sentenced to death June 7, 1974); *conviction reversed,* 315 So.2d 639 (La. 1975)

30. *Jessie Wilson* (black) (first degree murder), (Catahoula Parish No. 9321 (sentenced to death, May 30, 1974)

31. *Gregory England* (black) (first degree murder), Jefferson Parish No. 74311, (sentenced to death May 15, 1974)

32. *Johnson Washington* (black) (first degree murder), St. Charles Parish No. 30 T 762, (sentenced to death February 7, 1974); *conviction affirmed,* 321 So.2d 763 (La. 1974); *pending on petition for certiorari,* No. 75-6123

33. *Terry Selman* (white) (aggravated rape), Madison Parish No. 475476, (sentenced to death November 19, 1973); *conviction affirmed,* 300 So.2d 467 (La. 1974); *pending on petition for certiorari,* No. 74-6065

*See also State v. Hill,* 297 So.2d 660 (La.), *certiorari denied,* 419 U.S. 1090 (1974), (pre-trial appeal).